

The “Overlooked Hermaphrodite” of Campaign Finance: Candidate-Controlled Ballot Measure Committees in California Politics

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Campaign finance jurisprudence is currently in a bit of an odd spot: a candidate for public office is heavily restricted in the amount of contributions he or she may receive for an election campaign, but the same candidate is able to solicit and accept unlimited sums of money for a ballot measure committee that he or she controls. Despite the wide divergence in regulation, a candidate can use the unrestricted contributions held in the coffers of a ballot measure committee for political activities strikingly similar to those he or she would otherwise pursue with personal, restricted campaign funds, such as running media advertisements featuring the candidate or promoting his or her political views to voters prior to an election.

This apparent contradiction is a quarter-century old artifact of constitutional law. In 1981, the Supreme Court held in Citizens Against Rent Control v. City of Berkeley that the “prevention of corruption” rationale which justified limits on contributions to candidates did not apply to contributions made to ballot measure committees. The Court explained that because the fate of a ballot measure ultimately lies in the hands of the public instead of elected officials, there is no one to be “corrupted” by large contributions to initiative committees, and therefore any restrictions on contributions constitutes an unjustified infringement of political speech.

This Comment joins the growing chorus of voices arguing that the logic of City of Berkeley no longer holds true. An examination of the text

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of relevant Supreme Court decisions suggests the Court did not foresee the growing influence of initiatives in electoral politics and governance. An analysis of the historical development of candidate-controlled ballot measure committees (CCBMCs) coupled with an examination of modern campaign and fundraising practices (with a particular emphasis on California's 2005 special election) shows the political environment has evolved substantially in the twenty-five years since the Supreme Court decided *City of Berkeley*.

Now, elected officials face strong incentives to treat ballot measure contributions with almost the same importance as reelection contributions, in part because the candidate's popularity, agenda, and political power can be heavily influenced by how those contributions are spent and which initiatives pass or fail. CCBMCs have become, in effect, the "overlooked hermaphrodite"¹ of campaign finance: a unique and largely unrecognized creature bearing characteristics once believed to be mutually exclusive and whose very existence challenges the Supreme Court's antiquated view that candidates have no personal political interest in funding ballot measure advocacy. Furthermore, at least seventeen other states have campaign finance laws which could foster a substantial CCBMC presence and the risk of campaign finance circumvention that comes with it. The time has come for the judiciary to revisit and revise this doctrine.

INTRODUCTION

CCBMCs AND THE SCHWARZENEGGER REVOLUTION

On November 8, 2005, more than eight million Californians (roughly 50% of registered voters) heeded Governor Arnold Schwarzenegger's call and trudged to the polls for another special election to decide the fate of a slate of eight initiatives.² However, time had dimmed the voters' enthusiasm for special elections since 2003. Two years after being elected in a landslide recall of then-Governor Gray Davis, Arnold Schwarzenegger and his initiative-wielding administration became targets of voter anger.³

1. The term "hermaphrodite" is used here in the strictly zoological sense of an "organism of a species whose members possess both male and female sexual organs during their lives," and is meant only to communicate the idea of a non-human organism having characteristics originally and inaccurately thought to be mutually exclusive. See Wikipedia.org, Hermaphrodite entry, <http://en.wikipedia.org/wiki/Hermaphrodite>. The term does not refer to, nor does it intend to denigrate, human beings who identify as intersex or as having a Sex Differentiation Disorder. Furthermore, in using the term "overlooked hermaphrodite," I treat CCBMCs as distinct phenomena, different from the broader concept of "Hybrid Democracy" coined by Professor Elizabeth Garrett to describe the increasing convergence between initiative and candidate elections in general, a concept that is extremely relevant to this Comment's discussion. See Elizabeth Garrett, *Hybrid Democracy*, 73 GEO. WASH. L. REV. 1096 (2005).

2. George Skelton, *Poll Reveals Depth of Voters' Mistrust*, L.A. TIMES, Dec. 5, 2005, at B3.

3. OFFICE OF THE SECRETARY OF STATE, STATEWIDE SPECIAL ELECTION OCTOBER 7, 2003 (2003), <http://vote2003.ss.ca.gov>Returns/summary.html>.

Sixty percent of voters considered the 2005 special election “a bad idea” and an equal number disapproved of Schwarzenegger’s use of the initiative process to make public policy.⁴ Worse still, 72% thought the initiative process needed to be changed and 78% took the view that “state government is run by a few big interests.”⁵

Voters had reason to be cynical. After campaigning to “kick the ‘special interests’ out of Sacramento,” Governor Schwarzenegger actually exceeded the fundraising record of his predecessor, Gray Davis.⁶ In fact, Schwarzenegger’s “California Recovery Team” ballot measure committee (CRT), which managed contributions and expenditures for his four-measure special election reform agenda,⁷ took in more than \$44 million dollars since 2005—over 11% of the total contributions made to support or oppose the eight measures on the 2005 ballot.⁸ By comparison, Governor Schwarzenegger’s own 2006 reelection campaign collected only half of that amount (\$21 million) for all of 2005 through June 2006.⁹

What made the Governor’s seemingly Herculean fundraising task far easier was the total absence of contribution limits on donations to ballot measure committees (BMCs), including those controlled by elected officials. Under California law, a donor wishing to give to the Governor’s reelection campaign is held to a \$22,300 limit.¹⁰ A donor wishing to give to the Governor’s initiative campaign, however, is able to contribute as much as she or he can afford.

4. Press Release, Public Policy Institute of California, Special Post-Election Voter Survey: Bah Humbug! (Dec. 5, 2005), <http://www.ppic.org/main/pressrelease.asp?p=596>.

5. *Id.*

6. Peter Byrne, *The Truth About Arnold*, SALON.COM, Feb. 15, 2005, at 1, <http://www.salon.com/news/feature/2005/02/15/arnold/index.html?x> (“[T]he new governor has collected \$26 million—in chunks ranging from \$21,200 to \$1,000,000—from individuals and companies involved in high finance, real estate, insurance, construction, energy sales, entertainment, pharmaceuticals, electronics, prison corporations and major news media. (In his first year in office, Gray Davis collected \$13 million in special-interest contributions.)”).

7. That package consisted of Propositions 74, 75, 76 and 77. See California Special Election, 2005, http://en.wikipedia.org/wiki/California_special_election%2C_2005 (last visited March 30, 2006).

8. Cal-Access, California Office of the Secretary of State, Schwarzenegger’s California Recovery Team (CRT) (Id# 1261406), <http://cal-access.ss.ca.gov/> (accessed April 4, 2006) (spreadsheets on file with the author) (this data and all other data related to the 2005 Special Election was compiled by the author through the “Cal-Access” campaign finance database provided by the Office of the Secretary of State) [hereinafter, Cal-Access]. Total contributions to all thirty-five active ballot measure committees was over \$390 million for 2005 through March 2006, a banner year for contributions driven in large part by corporate and union spending. Dempsey, “CCBMCs 2000-05” spreadsheet, *infra* note 13 (spreadsheet based on Cal-Access data; on file with author).

9. Cal-Access, Californians for Schwarzenegger—2006 (Id# 1261585) (Aug. 29, 2006). Admittedly, this amount will increase substantially in the final months before the November 2006 general election.

10. See CAL. GOV’T CODE §§ 85301-85303, 83124 (Deering 2006) (imposing personal contribution limits with provisions for cost of living adjustments); see also 30 FPPC BULLETIN, GIFT AND CONTRIBUTION LIMITS ADJUSTED, No. 4, 4 (Dec. 2004), available at <http://www.fppc.ca.gov/bulletin/contribchart.pdf>.

As it turned out, some donors could afford quite a lot. For the 2005 special election, 78% of all contributions to the Governor's initiative committee came in the form of donations larger than the reelection campaign limit of \$22,300, and totaled nearly \$34 million dollars.¹¹

The Governor was not alone in focusing his fundraising efforts on ballot initiatives: five other candidates or elected officials controlled active ballot measure committees during 2005. Contributions to CCBMCs as a whole accounted for more than 14% of the total contributions (\$55 million) to all BMCs in 2005.¹² However, the \$44 million raised by the California Recovery Team accounted for nearly 80% of all 2005 CCBMC receipts¹³—making 2005 a year where contributions to CCBMCs dwarfed every other year on record (see Part III, *infra*). If nothing else, the 2005 special election demonstrates that CCBMCs now serve as major conduits for donors who wish to put huge contributions into the hands of elected officials for use in promoting political agendas.

The United States Supreme Court's 1981 decision *Citizens Against Rent Control v. City of Berkeley* facilitates this campaign windfall by keeping contribution limits for initiatives at bay.¹⁴ The decision struck down a contribution limit imposed on a citywide ballot measure on the theory that such limits are not necessary for initiatives because there is no risk of corruption. The Court noted that voters rather than elected officials make the final decision on a ballot measure and reasoned that "the public" could not be unduly influenced by contributions to individual ballot measure committees. The Court did not appear to consider that the interests of a candidate might be strongly tied to a ballot initiative—especially one he or she was promoting.

Since *City of Berkeley*, initiative spending in California has skyrocketed from \$25 million in 1982¹⁵ to around \$390 million in 2005.¹⁶

11. Cal-Access, *supra* note 8. This figure includes the \$7.75 million that Governor Schwarzenegger contributed to his own initiative campaign. Without the Governor's contributions, CRT would have raised a total of \$35.8 million, \$28 million of which came in amounts larger than \$22,300 (still 78%). Even more telling, that 78% came from only 352 donors—4% of the total number of contributors (7,948).

12. Dempsey, "CCBMCs 2000-05" Spreadsheet (spreadsheet based on Cal-Access data; on file with author). Those five committees are controlled by Assembly Speaker Fabian Nunez (D), former Assemblyman and State Senate candidate Darrell Steinberg (D), Insurance Commissioner candidate Steve Poizner (R), Assembly candidate Mary Hayashi (D), and LA City Council President Alex Padilla (D). Total BMC contributions for 2005 were more than \$390 million. *Id.*

13. CRT also accounted for 11% of total contributions toward ballot measures for 2005. *Id.*

14. 454 U.S. 290 (1981).

15. CALIFORNIA COMMISSION ON CAMPAIGN FINANCE, DEMOCRACY BY INITIATIVE, 283 (Table 8.9) (1992) [hereinafter CCCF].

16. Note that the 1982 figure relates to expenditures, while the 2005 figure reflects aggregate contributions to the active thirty-five BMCs in 2005. For the 2005 figure, I presume that expenditures will roughly equal contributions. See Dempsey, "CCBMCs 2000-05" spreadsheet, *supra* note 12. The two figures are compared only to show a general trend of substantial growth in campaign funding. Also

California's campaign watchdog agency, the Fair Political Practices Commission (FPPC), noticed the trend and tried to block the CCBMC fundraising loophole soon after Governor Schwarzenegger took office. In July 2004, the FPPC promulgated regulation section 18530.9, which imposed contribution limits on CCBMCs such as the Governor's California Recovery Team.¹⁷ However, the Schwarzenegger-allied initiative committee Citizens to Save California and Governor Schwarzenegger himself immediately challenged the new FPPC rule and secured an injunction which the Third Circuit recently upheld, largely because the regulations improperly contradicted existing statute.¹⁸

Leaving this decision aside, any present or future restriction on CCBMC contributions that is reviewed on the merits will need to address constitutional precedent stretching back to the 1978 Supreme Court decision *First National Bank of Boston v. Bellotti*. In striking down a ban on corporate contributions to referendum campaigns, *Bellotti* also found that the corruption rationale justifying restrictions on candidate contributions does not apply to initiative contributions.¹⁹ *City of Berkeley* later took that rationale and barred contribution limits for all ballot measure committees.²⁰ Whether the *Citizens to Save California* case, or another suit like it, serves as the vehicle, any challenge on the merits would provide the Court with an opportunity to revisit *Bellotti* and *City of Berkeley* and reconsider whether initiative campaigns should continue to operate free from fundraising restrictions.

This Comment has three aims in addressing campaign finance for CCBMCs. Its first is to augment the historical record of CCBMCs by examining their prevalence at the time *Bellotti* and *City of Berkeley* were decided and comparing that record with present figures from the 2005 special election.²¹ That comparison will show that CCBMCs did not exist in California in significant numbers at the time of *Bellotti* and *City of Berkeley*, but have since become a prominent factor in the state's initiative

note that these figures and all other historical contribution figures cited in this Comment are not inflation-adjusted, but are presented as given by the respective source.

17. Cal. Code Regs. 2, § 18530.9 (see annotated history).

18. *Citizens to Save California v. FPPC*, Case No. 05AS00555 (Sacramento Super. Ct. 2005). The Third Circuit subsequently upheld the injunction on the grounds that the regulation exceeded the authority of the FPPC. Case No. C049642 (3d Cir. Cal. Ct. App. Dec. 12, 2006). Unfortunately, the Third Circuit decision was released immediately before this Comment went to print and could not be reviewed in depth here. The viability of further appeals is not yet clear.

19. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978).

20. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981).

21. The role of initiatives in campaigns and political law is a complex and emerging issue. Readers interested in further exploration of the subject have a growing wealth of sources to turn to. In particular, Professors Richard Hasen of Loyola Law School and Elizabeth Garrett of the University of Southern California write extensively on this and related topics. See generally Garrett, *supra* note 1, at 1105-10; Richard Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. CALIF. L. REV. 885 (2005).

system. The Comment's second aim is to provide a basic overview of the CCBMC phenomenon to better understand this "overlooked hermaphrodite" and the main arguments against its continued insulation from contribution restrictions. With this analysis, the Comment joins other commentators in arguing that the rise of the CCBMC undermines *City of Berkeley's* core assumption—the notion that candidates have no political interest in ballot measure campaigns—and avers for the Court's reconsideration of this outdated rule. Finally, this Comment's third aim is simply to point out the potentially national reach of the CCBMC problem, as at least seventeen other states have some form of individual candidate campaign finance limit while lacking similar limits on contributions to BMCs. Such conditions offer a hospitable environment for CCBMCs and an incentive to circumvent contribution restrictions. Future researchers may wish to focus on these states first as the most likely hosts of this curious phenomenon.

Part I of this Comment provides a brief overview of the history of the California initiative and the mechanics of BMCs. Part II reviews the major court cases shaping the law shielding BMCs from regulation, and encompasses critiques of the controversial doctrine. Part III examines three lines of argument—textual, historical, and strategic—and the supporting data underscoring the growing intellectual bankruptcy of the *City of Berkeley* rule. Finally, Part IV briefly discusses other states that may share California's experience with CCBMCs and argues for contribution restrictions on CCBMCs alone, at the very least, as a limited but defensible response to the problem.

I

BACKGROUND: DIRECT DEMOCRACY IN CALIFORNIA

A. *History: The Origin and Use of the Initiative Process in California*

The initiative process in California began, ironically, as an attempt to drive corporate money out of politics. At the dawn of the 20th century, many Californians believed the Southern Pacific Railroad "machine" had co-opted the Legislature, the courts, and even the press, enabling the company to dominate the levers of government.²² At the same time Californians were feeling disempowered, a "great wave" of Populist sentiment was supposedly sweeping through the country and spurring calls for increased popular influence in government, particularly at the local level.²³ By 1903 Los Angeles had become the first city in California to

22. JOHN M. ALLSWANG, *THE INITIATIVE AND REFERENDUM IN CALIFORNIA 1898-1998*, 13 (2000).

23. *Id.* at 10-11.

adopt the ballot initiative. Efforts to implement direct democracy statewide quickly followed.²⁴

In 1910, reformist gubernatorial candidate Hiram Johnson incorporated the initiative, referendum, and recall proposals into his campaign platform, arguing the Southern Pacific Railroad had “debauched, polluted and corrupted our state” and that implementing direct democracy would permit the citizenry to regain control over policymaking.²⁵ The message resonated with voters. Johnson became Governor and dozens of progressives (from both parties) rode his coattails into office.²⁶ In 1911, Governor Johnson called a special election and the Legislature placed the initiative, referendum, and recall proposals on the ballot.²⁷ Californians overwhelmingly approved these state constitutional amendments—by greater than a 3:1 margin—and California became the tenth state in the nation to give its voters the power to propose changes to the state’s statutes and Constitution directly.²⁸

California voters have been busy at the ballot box ever since. Between 1912 and 2002, no fewer than 1,187 initiatives were drafted and circulated, and 290 qualified for the ballot.²⁹ Of those qualified, ninety-nine measures were approved by voters.³⁰ During this period, the intensity of initiative use waxed and waned (and waxed again). After a sharp drop during the 1950s and 1960s, the number of initiatives qualified for the ballot went through the roof in the 1970s. The number went from ten qualified initiatives in the 1960s to twenty-four in the 1970s, and then to fifty-four in the 1980s.³¹ During the 1990s, California saw sixty-one qualified initiatives out of the nearly 400 circulated.

Given the increasing prevalence of ballot initiatives over the past thirty years, three major ballot initiative milestones deserve mention. The first is the passage of the Political Reform Act (Proposition 9) in 1974, which inaugurated the post-Watergate era of campaign regulation and

24. *Id.* at 10-12.

25. *Id.* at 15.

26. *Id.*

27. *Id.* at 17-19.

28. OFFICE OF THE SECRETARY OF STATE, A HISTORY OF CALIFORNIA INITIATIVES 3 (Dec. 2002), available at http://www.ss.ca.gov/elections/init_history.pdf [hereinafter A HISTORY OF CALIFORNIA INITIATIVES]. South Dakota was the first state to adopt direct democracy, followed by Utah, Oregon, Montana, Oklahoma, Missouri, Michigan, Arkansas, and Colorado. As of 2006, twenty-four states have the initiative and popular referendum. Initiative and Referendum Institute, I & R Factsheet Number 3, Which States Have the Initiative and Referendum Process?, <http://www.iandrinstute.org/Quick%20Fact-Handouts.htm>.

29. *Id.* at 9.

30. *Id.*

31. *Id.* at 11-14.

ushered in the state's first serious campaign finance data collection and disclosure mandate.³²

The second milestone is a measure that bears partial responsibility for the pronounced increase in initiative usage in the 1970s and 1980s: the passage of the property tax restraint measure (Proposition 13) in 1978. Passed in that year by a 2:1 margin after years of failed attempts, Proposition 13 capitalized on an anti-tax backlash among homeowners angered by skyrocketing property taxes.³³ The enormous popularity of tax reform grabbed the attention of political activists and special interest groups; some even suggest that it "launched the role of California's initiatives as national models."³⁴ After 1978, the number of initiatives approved by voters increased markedly: between 1958 and 1978, voters qualified an average of three measures and approved an average of one measure for every biennial election. In comparison, between 1980 and 2000 voters qualified an average of eleven measures and approved an average of five.³⁵

California's third initiative milestone is the recent recall election that ushered in a new era of vigorous initiative activity. When actor Arnold Schwarzenegger completed his recall campaign against then-Governor Gray Davis in 2003, it was the first successful recall of a statewide elected official in California history.³⁶ Emboldened by the public's positive reception and facing a Democratically-controlled Legislature, the new Republican Governor pursued those policies he could not win legislatively through the ballot box instead. Since the recall, Californians have voted on Schwarzenegger-backed initiatives three times: the 2004 primary election, the 2004 general election, and the 2005 special election.

Interestingly, Schwarzenegger's heavy reliance on the initiative system was foreshadowed before the recall. He successfully promoted the "After School Education and Safety Program Act" (Proposition 49) in 2002, which some observers viewed correctly as an audition for a political

32. Political Reform Act of 1974, CAL. GOV'T CODE § 81000, *et seq.* (Deering 2006). Proposition 9 enacted a host of campaign finance protections including more detailed reporting of contributions, new limits on campaign expenditures, registration for lobbyists, tougher conflict of interest rules, and the creation of two state governmental watchdog organizations. Though elements such as expenditure limits were later struck down by the courts, the PRA remains the basic foundation for much of California's campaign finance law. It is worth noting that the drafting of this initiative was influenced in large part by Jerry Brown, the California Secretary of State who was running for Governor in 1974 and subsequently won. ALLSWANG, *supra* note 22, at 119-21.

33. ALLSWANG, *supra* note 22, at 107, 105-11.

34. *Id.* at 110.

35. *Id.* at 142. "The rate had definitely picked up after Proposition 13 of 1978." A HISTORY OF CALIFORNIA INITIATIVES, *supra* note 28, at 11-13.

36. Wikipedia.org, 2003 California Recall, http://en.wikipedia.org/wiki/2003_California_recall. High-profile recall campaigns have been waged before, such as the successful drive to recall Chief Justice Rose Bird of the California Supreme Court in 1986. See ALLSWANG, *supra* note 22, at 176-77.

career.³⁷ Once elected Governor, Schwarzenegger put two initiatives (Propositions 57 and 58) on the March 2004 primary ballot, although only one (Proposition 57, the Economic Recovery Bond) passed.³⁸ The Governor also actively participated in the 2004 general election with generally positive results.³⁹ However, his more recent attempt at governing through the ballot box—the 2005 special election—fared poorly: all four measures he proposed or supported went down in defeat.⁴⁰

The heavy use of initiatives in California shows no sign of letting up. The 2006 primary election included two propositions, while the general election ballot had thirteen propositions on it. Two initiatives have already qualified for 2008.⁴¹

B. *Taxonomy: How Ballot Measure Committees Work*

The initiative power in California permits individuals to propose statutes or constitutional amendments that are submitted directly to the electorate for approval.⁴² This power differs slightly from the referendum, which permits voters to approve or deny legislative enactments or amendments; and the recall, which permits voters to remove an elected official from office.⁴³ The three powers (initiative, referendum, and recall) are often referred to collectively as “direct democracy,” although the initiative and referendum are more precisely termed “direct legislation.”⁴⁴

An initiative can be placed on the ballot by anyone. For an initiative to be qualified, a proponent must present the Secretary of State with the text of the proposed initiative along with a substantial number of verifiable signatures.⁴⁵ Once qualified, a measure receives a slot on either a primary

37. See Meredith May, *Schwarzenegger in S.F. pushing after-school plan*, S.F. CHRON., Oct. 12, 2002, available at <http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2002/10/12/BA164398.DTL>; see also Wikipedia.org, California Proposition 49 (2002), http://en.wikipedia.org/wiki/California_Proposition_49_%282002%29.

38. OFFICE OF THE SECRETARY OF STATE, MARCH 2004 ELECTION RESULTS (2004), available at http://www.ss.ca.gov/elections/sov/2004_primary/contents.htm.

39. For example, the Governor actively campaigned against two tribal gaming propositions, Propositions 68 and 70, both of which were defeated. See Cal-Access, 2004 General Election, NO ON 68 & 70-GOVERNOR SCHWARZENEGGER'S COMMITTEE FOR FAIR SHARE GAMING AGREEMENTS (last visited Mar. 28, 2006).

40. OFFICE OF THE SECRETARY OF STATE, NOVEMBER 2005 ELECTION RESULTS (2005), available at <http://vote2005.ss.ca.gov>Returns/prop/00.htm>.

41. OFFICE OF THE SECRETARY OF STATE, 2006 INITIATIVE UPDATE, available at http://www.ss.ca.gov/elections/elections_j.htm (last visited Dec. 2, 2006).

42. CAL. CONST. art. II, § 8(a). Regarding power to amend the state constitution, see CAL. CONST. art. XVIII, § 3. Note that I use the terms “initiative,” “ballot measure,” and “Proposition” interchangeably.

43. ALLSWANG, *supra* note 22, at 1.

44. *Id.*

45. Five percent of all votes cast in last gubernatorial election were for statutory changes, 8% were for constitutional amendments. CAL. CONST. art. II, § 8(b). An individual who takes the first step

or general election ballot, corresponding to a number unique to that year only.⁴⁶ The legislature may also place measures on the ballot to issue bonds and to create or amend statutes, the state Constitution, and even previous propositions.⁴⁷

A ballot measure committee is a group “formed or existing primarily to support or oppose the qualification, passage, or defeat of a ballot measure.”⁴⁸ In practice, BMCs receive contributions and use them to fund campaign communications, such as endorsement letters, slate mailers, and advertisements in print, radio and television media. There are two kinds of BMC: a “primary” committee created mainly to support or oppose a particular ballot measure in a specific election, and a “general” committee that supports or opposes various measures over multiple elections.⁴⁹ A committee is considered “candidate controlled” if an officeholder, candidate, candidate’s proponent, candidate’s agent, or any other committee he or she controls wields significant influence over the actions or decisions of the committee, especially decisions related to expenditures.⁵⁰ BMCs controlled by candidates or officeholders (making them CCBMCs) must disclose that fact when the committee is formed.⁵¹ Any committee receiving over \$1,000 in contributions must register a “Statement of Organization” with the FPPC, and comply with various disclosure and reporting requirements thereafter.⁵² The Secretary of State collects and makes public a wide variety of campaign finance data on BMCs and candidates alike.⁵³

by requesting formal ballot measure language, title, and summary from the Attorney General that can be circulated and qualified is the “proponent” of the measure.

46. *Id.* at 6. Prior to 1982, Proposition numbers were recycled between primary and general elections, leading to no small amount of confusion. *Id.*

47. ALLSWANG, *supra* note 22, at 67.

48. CALIFORNIA SECRETARY OF STATE, 2003-2004 INITIATIVE GUIDE (2004), available at http://www.ss.ca.gov/elections/init_guide_2003_2004.htm (last visited Aug. 30, 2006) (see Measure Committee Reporting Duties).

49. FAIR POLITICAL PRACTICES COMM’N, FORM 410—STATEMENT OF ORGANIZATION 5, available at <http://www.fppc.ca.gov/forms/1-05forms/410.pdf> (last visited May 18, 2006). See CAL. GOV’T CODE § 82047.5 (Deering 2006) for the definition of “primarily formed committee.”

50. CAL. GOV’T CODE § 82016 (Deering 2006) defines a “controlled committee” as:

a committee that is controlled directly or indirectly by a candidate or state measure proponent or that acts jointly with a candidate, controlled committee, or state measure proponent in connection with the making of expenditures. A candidate or state measure proponent controls a committee if he or she, his or her agent, or any other committee he or she controls has a significant influence on the actions or decisions of the committee.

51. FAIR POLITICAL PRACTICES COMM’N, *supra* note 49.

52. *Id.* at 1. See also CAL. GOV’T CODE § 82013 (Deering 2006).

53. See California State Archives, Collections, available at http://www.ss.ca.gov/archives/archives_e.htm#elections (last visited Apr. 13, 2006). The collections hold records on elections (1849-1996) and campaign spending (1894-1994). Data on BMC contributions and expenditures (of varying levels of completeness) are also available on paper at the State Archives for the years ranging from 1975-1994. More recent records that are not available via Cal-Access (pre-1999) can be obtained by contacting the Secretary of State’s Political Reform Division available at <http://www.ss.ca.gov/prd/prd.htm>.

With the mechanics of initiatives and ballot measure committees established, the next Part briefly reviews the major cases leading up to the pending *Citizens to Save California* case and discusses the most promising arguments against the *City of Berkeley* doctrine.

II

CASE LAW: CAMPAIGN FINANCE JURISPRUDENCE AND THE DISTINCTION BETWEEN CANDIDATES AND BALLOT MEASURE COMMITTEES

According to most commentators, the modern campaign finance era originated in the aftermath of Watergate.⁵⁴ In 1974, Congress set about toughening the Federal Election Campaign Act of 1971 (FECA).⁵⁵ The 1974 FECA amendments attempted to impose three types of campaign finance restrictions: contribution limits, expenditure limits, and public disclosure of contributions and expenditures.⁵⁶ These changes were all made to blunt money's "perceived deleterious impact" on elections, as demonstrated by the Watergate scandal.⁵⁷ However, the changes also threatened important First Amendment freedoms of political speech and association, and FECA was challenged almost immediately. Over time, the Court developed a campaign finance jurisprudence focused on the prevention of candidate corruption and its appearance as the primary justification for restrictions on political donations. Unfortunately, this focus may have ultimately made it more difficult for the Court to justify (or even imagine) putting similar restrictions on BMCs because such committees ostensibly lack a candidate to corrupt.

A. *Buckley v. Valeo*

The Supreme Court's review of FECA led to the seminal campaign finance decision *Buckley v. Valeo*.⁵⁸ In upholding certain individual contribution limits as well as disclosure and reporting requirements while striking down expenditure limits, the *Buckley* Court announced that a strict scrutiny standard applies to campaign finance restrictions, and it sought to balance the protection of "the most fundamental First Amendment activities" of political expression and association against the need to regulate political conduct.⁵⁹ According to the Court, political behavior may be regulated "if the State demonstrates a sufficiently important interest and

54. See, e.g., SAMUEL ISSACHAROFF, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 457 (2002).

55. 2 U.S.C. § 441, *et seq.* (2001).

56. ISSACHAROFF, *supra* note 54, at 457 (2002).

57. *Id.*

58. 424 U.S. 1 (1976) (per curiam).

59. *Id.* at 14.

employs means closely drawn to avoid unnecessary abridgment of associational freedoms.”⁶⁰

In conducting its analysis, the Court recognized an important, indeed compelling, government interest in “preventing corruption and the appearance of corruption” in the electoral process—corruption being the danger of *quid pro quo* exchanges between donors and candidates or other officials with governmental power.⁶¹ Moreover, public awareness of the possibility of corruption provided the government with an interest in preventing even the appearance of impropriety, lest “‘confidence in the system of representative Government . . . be eroded to a disastrous extent.’”⁶² The Court also found that contribution limits can be constitutional so long as they are not set so low as to prevent candidates and committees from raising enough money to engage in “effective advocacy.”⁶³

B. First National Bank of Boston v. Bellotti

Buckley's legacy was a strict scrutiny standard of review for legislation restricting campaign finance, and the recognition of a compelling governmental interest in preventing corruption of the electoral process and its appearance. Following *Buckley*, the *Bellotti* Court held two years later that corporations had political speech rights similar to natural persons. However, in the same decision it also became clear that the *Buckley* corruption analysis did not apply to candidates and BMCs equally. *Bellotti* primarily addressed a First Amendment challenge to a Massachusetts statute prohibiting corporations from making certain expenditures in relation to state referendum proposals (in this case, a state constitutional amendment relating to a graduated income tax),⁶⁴ but the Court's decision is most important here for the critical distinction it makes between candidate elections and direct legislation.

In holding that corporations do indeed have protected speech rights, the Court declared that referenda are altogether different from candidate elections. In the case of referenda, voters make the policy decisions rather than elected candidates, and those voters are not likely to be corrupted by contributions to ballot measure committees. Because the subject of a referendum—like an initiative—is a policy issue rather than a candidate, “[t]he risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue.”⁶⁵

60. *Id.* at 25.

61. *Id.* at 45, 26-27.

62. *Id.* at 28 (quoting *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973)).

63. *Id.*

64. 435 U.S. 765 (1978).

65. *Id.* at 790.

The possibility that vacuous or biased advertising for or against a ballot measure may sway voters is “hardly a reason to suppress it”⁶⁶

In coming to this conclusion, *Bellotti* relied on the 1974 Second Circuit case *Schwartz v. Romnes*, which also addressed a corporate expenditure ban.⁶⁷ *Schwartz* held that initiatives are not susceptible to the corruption that candidate elections are prone to because with an initiative there is simply no candidate to corrupt. The Second Circuit reasoned that “[t]he spectre [sic] of a political debt created by a contribution to a referendum campaign is too distant” to justify restrictions otherwise applicable to candidate committees.⁶⁸ The *Bellotti* Court incorporated this logic into its own opinion, thereby enshrining a belief in the inherent separation of candidates and initiatives as the new law of the land.

C. Citizens Against Rent Control v. City of Berkeley

Bellotti's Manichean view of initiatives and candidates as separate and mutually exclusive formed the cornerstone of the Court's subsequent decision in *Citizens Against Rent Control v. City of Berkeley*, where it barred governments from regulating contributions to initiative campaigns. In that case, the campaign organization Citizens Against Rent Control (CARC) challenged the constitutionality of a municipal ordinance limiting contributions to local BMCs.⁶⁹ CARC was organized to oppose a municipal rent control measure and accepted contributions in excess of the city's \$250 individual contribution limit. After CARC was fined by Berkeley's campaign finance agency for violating the contribution limit, it sought an injunction in Superior Court, which upheld the fine.⁷⁰ On appeal, the California Supreme Court upheld the ordinance as serving a compelling government interest under *Buckley*.⁷¹

66. *Id.*

67. 495 F.2d 844 (2d Cir. 1974). The Court also cited *C & C Plywood Corp. v. Hanson*, 420 F. Supp. 1254 (1976) (striking down a prohibition on corporate contributions to initiatives and referenda, which are essentially legislative in nature) and *Pacific Gas & Electric Co. v. City of Berkeley*, 131 Cal. Rptr. 350, 353 (Cal. Ct. App. 1976) (striking down a similar prohibition on corporate contributions).

68. *Schwartz*, 495 F.2d at 853. “Whatever the justification for prohibiting contributions that are prone to create political debts, it largely evaporates when the object of prohibition is not contributions to a candidate or party, but contributions to a public referendum.” *Id.* at 852-53.

69. 454 U.S. 290 (1981); see BERKELEY, CAL., ELECTION REFORM ACT OF 1974, ORD. No. 4700-NS § 602.

70. See *Citizens Against Rent Control v. City of Berkeley*, 614 P.2d 742, 743 (Cal. 1980), *rev'd*, 454 U.S. 290 (1981).

71. *Id.* at 745. In an insightful decision that presaged later arguments against what became the *City of Berkeley* doctrine, the state Supreme Court wrote that while the initiative was enacted to restore popular control over a legislative process vulnerable to “special interests,” the same special interests could co-opt the initiative process. *Id.* at 745-46. The court also distinguished *Bellotti* by noting that the restrictions at issue in that case imposed a complete ban on contributions and expenditures, while the Berkeley measure imposed only a modest contribution limit—a practice explicitly condoned in *Buckley*. *Id.* The court cautioned “that unlimited expenditures by individuals and corporations can be as

The U.S. Supreme Court disagreed and overturned the California Supreme Court's decision. Chief Justice Burger wrote that the contribution limit unduly infringes the right of association because it limits the spending power of "individuals wishing to band together to advance their views on a ballot measure, while placing no restrictions on individuals acting alone [e.g., independent expenditures]." ⁷² The Court read *Buckley*'s discussion of contribution limits very narrowly, effectively holding that contribution limits are only justified by the compelling government interest in addressing the threat of *quid pro quo* arrangements with candidates. ⁷³ Invoking *Bellotti*'s rationale, the Court held that ballot measures simply do not carry a risk of corruption because they are "a popular vote on a public issue." ⁷⁴ As such, the *City of Berkeley* Court prohibited contribution limits for BMCs, leaving public disclosure requirements to serve as the primary bulwark against corruption. ⁷⁵

Justice White's dissent in *City of Berkeley* rejected the precedents of *Buckley* and *Bellotti*, arguing that some limits for both expenditures and contributions were justified by the compelling state interest in preventing corporate domination of initiative finance. ⁷⁶ His closing words were prescient:

Perhaps . . . neither the city of Berkeley nor the State of California can "prove" that elections have been or can be unfairly won by special interest groups spending large sums of money, but there is a widespread conviction in legislative halls, as well as among citizens, that the danger is real. I regret that the Court continues to disregard that hazard. ⁷⁷

*D. Subsequent Cases and Possibilities for Reform:
Hasen's "New Deference Quartet" and Randall v. Sorrell*

In the twenty-five years since *City of Berkeley* a great deal has changed in campaign finance and the Court's jurisprudence. In an insightful 2005 symposium piece, Professor Richard Hasen reviewed four

sinister as unlimited contributions to committees" and that a legislative finding of a compelling state interest should receive deference from the court. *Id.* at 749.

72. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296 (1981).

73. *Id.* at 296-97.

74. *Id.* at 298, quoting *Bellotti*, 435 U.S. at 790. The Court also cited *C & C Plywood Corp. v. Hanson*, 583 F.2d 421, 425 (1978) ("The state interest in preventing corruption of officials, which provided the basis for the Supreme Court's finding in *Buckley* that restrictions could permissibly be placed on contributions, is not at issue here.") and *Let's Help Florida v. McCrary*, 621 F.2d 195, 199 (1980) ("The sole governmental interest that the Supreme Court recognized as a justification for restricting contributions was the prevention of quid pro quo corruption between a contributor and a candidate."). *City of Berkeley*, 454 U.S. at 297.

75. *City of Berkeley*, 454 U.S. at 299-300.

76. *Id.* at 307-308. (White, J., dissenting).

77. *Id.* at 311.

more recent Supreme Court campaign finance decisions which he termed the “New Deference Quartet,” and argued that the decisions suggest the Court may now be more receptive to campaign finance restrictions on BMCs.⁷⁸ While the Quartet cases do not specifically focus on ballot measure committees,⁷⁹ they do hint at an increasing willingness on the part of the Court to defer to lawmakers imposing campaign finance limitations to prevent corruption.⁸⁰ However, the most recent campaign finance decision from the Roberts Court, *Randall v. Sorrell* from June 2006, suggests that willingness may already be in decline.

Professor Hasen’s analysis of the Quartet identifies three main indications of the Court’s willingness to accept ballot measure contribution limits. First, the Court lowered the evidentiary burden needed for campaign finance restrictions to survive First Amendment challenges.⁸¹ Second, the Court displayed less hostility towards an “equality rationale” justifying restrictions that help ameliorate the asymmetric advantages of wealthy donors.⁸² Third, the Court upheld related limits on corporate and union campaign involvement.⁸³ Considered together, these cases lead Hasen to conclude that “arguments about how ballot measure limits are necessary to prevent ‘corruption’ or ‘preserve voter confidence’ are more likely to gain a receptive hearing by the Court than they would have in the past.”⁸⁴

Of particular interest among the Quartet is the 2000 decision, *Nixon v. Shrink Missouri Government PAC*, in which the Supreme Court ruled that election contribution limits imposed in the service of a “sufficiently important” interest will be upheld as constitutional.⁸⁵ In practice this holding indicates that the justification for contribution limits no longer needs to meet the tougher “narrowly tailored” standard.⁸⁶ The *Nixon* Court also held that state and local governments should not face a prohibitively

78. Hasen, *supra* note 21.

79. *Id.* at 891-94. Those cases are: *FEC v. Colo. Republican Fed. Campaign Comm’n*, 533 U.S. 431 (2001) (upholding federal law treating coordinated expenditures as contributions); *FEC v. Beaumont*, 539 U.S. 146 (2003) (upholding a ban on campaign contributions made by corporations for purely ideological purposes); *McConnell v. FEC*, 540 U.S. 93 (2003) (permitting, *inter alia*, a lower standard of evidence to satisfy restrictions on “soft money”, “issue advocacy”, and certain forms of election advertising, as well as shifting the focus of the standard from “corruption or appearance of corruption” to simply “the appearance of corruption”); and *Nixon v. Shrink Mo. Gov’t Pac*, 528 U.S. 377 (2000) (discussed in detail below).

80. *Id.* at 886.

81. *Nixon*, 528 U.S. at 391-394.

82. The “equality rationale” suggests a jurisprudence that attempts to rectify, at least in part, the distortions in electoral speech caused by campaign spending from corporations with “immense aggregations of wealth” having little correlation to public opinion. See Hasen, *supra* note 21, at 894 (discussing *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659-60 (1990)).

83. Hasen, *supra* note 21, at 886.

84. *Id.* at 886-87.

85. *Id.* at 891. See also *Nixon*, 528 U.S. at 391; Richard L. Hasen, *Shrink Missouri, Campaign Finance, and “The Thing that Wouldn’t Leave,”* 17 CONST. COMMENTARY 483, 489-97 (2000).

86. Hasen, *supra* note 21, at 891.

high evidentiary standard to prove a compelling state interest in preventing corruption.⁸⁷ The Court even expanded the definition of corruption to reach beyond *quid pro quo* arrangements and include “the broader threat from politicians too compliant with the wishes of large contributors.”⁸⁸ Such a shift in doctrine, if maintained, will have significant implications. Indeed, as some experts argue, if a genuine threat of corruption can come from large contributions based on the aggregation of wealth—and not just *quid pro quo* arrangements—then there is no logical reason to permit contribution limits for candidate races but not for ballot measure contests.⁸⁹

In the same vein, the federal government recently imposed minor limits on federal candidate fundraising in state ballot measure contests. In 2003, the Federal Elections Commission issued an advisory opinion stating that a federal officeholder who wishes to raise money for a state ballot measure committee is still bound by the contribution limits of the Bipartisan Campaign Reform Act (BCRA).⁹⁰ How this new advisory opinion will square with *City of Berkeley* remains to be seen.

However, there is evidence that the Roberts Court may not continue in the more deferential footsteps of the previous Court. In June of 2006, the new Court released its first major campaign finance decision in *Randall v. Sorrell*.⁹¹ The decision struck down a Vermont law that restricted campaign expenditures by statewide candidates and imposed low contribution limits on donations to the candidates themselves.⁹² The plurality decision, authored by Justice Breyer, held that the expenditure limits were already prohibited by *Buckley*, while the contribution limits were so low as to prevent effective competition and failed the First Amendment requirement of being “closely drawn” to match the state’s compelling interest.⁹³ Most notably, the Court engaged in a five-factor balancing inquiry to determine that the contribution limit was unduly restrictive and negatively impacted political competition.⁹⁴

87. *Nixon*, 528 U.S. at 391. Justice Souter noted “there is little reason to doubt that sometimes large contributions will work actual corruption of our political system.” *Id.* at 395.

88. *Id.* at 389.

89. SHAUN BOWLER, TODD DONOVAN, & CAROLINE J. TOLBERT, *CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES* 48 (1998).

90. Paul S. Ryan, *The Case For Limiting Contributions to Candidate-Controlled Ballot Measure Committees*, 56 ADMIN. L. REV. 825, 828 (2004) (citing FEC Advisory Opinion 2003-12 (July 29, 2003), available at <http://herndon3.sdrdc.com/ao/ao/030012.html>).

91. 126 S. Ct. 2479 (2006).

92. *Id.* at 2485.

93. *Id.*

94. *See id.* at 2491-2500. The five factors were: evidence of significant restrictions in the funding available for challengers, the restrictions on political parties threatened First Amendment rights of association, the restriction on volunteer services threatened First Amendment rights of association, the lack of inflation adjusted limits, and the lack of a special justification that would warrant such low contribution limits. *Id.*

Such a detailed balancing inquiry appears to distance the *Randall* Court from the earlier “New Deference” cases explained by Professor Hasen.⁹⁵ The Court’s extended analysis and requirement that the state provide a special justification for the measure suggests a movement by the newly minted Roberts Court away from the legislative deference and lower evidentiary threshold typified by *Nixon*. Nor does the Court make any move to legitimate the “equality rationale” suggested in *Austin v. Chambers*. But whatever the larger meaning of *Randall* and its implications for the ongoing viability of Hasen’s Quartet may be, the decision does suggest that new restrictions on political contributions may not be an easy sell to the new Court. Again, only time and *certiorari* will tell.

E. Citizens to Save California v. Fair Political Practices Commission

As mentioned in the Introduction, one legal battle over the *City of Berkeley* precedent has already begun. Yet the first two *Citizens to Save California* decisions did not bode well for proponents of contribution limits. The lower court’s May 2005 injunction held that the FPPC overstepped its authority in drafting a regulation that conflicted with the language of the Political Reform Act. Nor did the FPPC draw the regulation closely enough to avoid infringing on legal committee activities.⁹⁶ Nevertheless, the decision is also notable for its holding that *City of Berkeley* would not be controlling because the FPPC regulation addressed CCBMCs only, rather than all BMCs.⁹⁷

The FPPC quickly appealed the injunction, but the Third Circuit affirmed the trial court’s holding.⁹⁸ The appellant’s substantive arguments notwithstanding, the appellate court agreed that the FPPC had exceeded its authority by promulgating a regulation that directly conflicted with the language of the Political Reform Act.⁹⁹ However, the court did note that the original *Citizens Against Rent Control* decision left open the possibility that the state could count contributions to CCBMCs against a candidate’s regular contribution limits as an alternative form of restriction.¹⁰⁰ Nevertheless, the *Citizens to Save California* decisions suggest that the FPPC’s regulation was fatally flawed and that other attempts at administrative regulation will likely run afoul of the PRA.

95. Richard Hasen, *The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law after Randall v. Sorrell*, 68 OHIO ST. L.J. (forthcoming Apr. 2007).

96. Final Ruling on Motion for Preliminary Injunction, *Citizens to Save Cal. v. FPPC*, Case No. 505AS00555 (Sacramento Super. Ct. Mar. 25, 2005). The trial court judgment date was May 2, 2005.

97. *Id.* at 19.

98. *Citizens to Save California v. FPPC.*, Case No. C049642 (3d Cir. Cal. Ct. App. Dec. 12, 2006).

99. *Id.* at 2-3.

100. *Id.* at 6-7.

Practically speaking, this means that a statute or ballot measure initiative will need to be enacted (and challenged) for the issue to be heard on the merits. Unfortunately, this is more easily said than done. The most recent attempt to create a statutory contribution limit—a state Assembly bill to impose a \$5,600 contribution limit on all CCBMCs—was killed by a bipartisan vote in the California Senate in July 2005.¹⁰¹ Similarly, a public campaign finance measure on the 2006 November ballot, Proposition 89, also contained provisions that would impose a \$10,000 contribution limit on BMCs with which candidates for statewide office are significantly involved, but was defeated by a 3-1 margin.¹⁰² Regardless of the vehicle, a legal challenge to limits on initiative fundraising may be inevitable given the increasingly salient role CCBMCs play in California politics. If and when that challenge arises, litigants seeking to justify reasonable limits on CCBMC contribution will need to present evidence showing that the Court's perceived dichotomy between initiative and candidate is hopelessly outdated. One major source of such evidence may come from carefully examining the rise of the curious organism at the center of the debate: the candidate-controlled ballot measure committee.

III

ANALYSIS: THE EVOLUTION OF THE CANDIDATE-CONTROLLED BALLOT MEASURE COMMITTEE

When naturalist Charles Darwin returned to England after an arduous five-year voyage on the *HMS Beagle* stretching across the world to the Galapagos Islands and back, he famously opined that all organisms are engaged in a great "Struggle for Existence," with "survival of the fittest" as a guiding principle.¹⁰³ Based on his exhaustive study of the differences between seemingly related animals, such as the various species of pigeon, Darwin rocked scientific thought with the observation that groups of organisms can physically evolve over time in response to their environment.¹⁰⁴ Any organism, he wrote, "if it vary . . . in any manner profitable to itself, under the complex and sometimes varying conditions of

101. A.B. 709, 2005-06 Gen. Sess. (as amended, May 19, 2005) (Cal. 2005). It is worth noting that amendments to the Political Reform Act (which includes the Prop 34 contribution limits) require a 2/3 vote of both legislative houses, which not only means that statutory change will be more difficult to enact, but that the initiative will be a more attractive avenue for reform. Cal. Gov't Code § 81012 (Deering 2006).

102. Voter Information Guide, Proposition 89 (Official Title and Summary), 2006 General Election, Article 14, page 181, available at <http://www.voterguide.ss.ca.gov/props/prop89/prop89.html> (last viewed October 8, 2006). 2006 General Election Results – State Ballot Propositions, available at <http://vote.ss.ca.gov>Returns/prop/00.htm> (last viewed Dec. 3, 2006). Proposition 89 was defeated 26% for and 74% against.

103. CHARLES DARWIN, THE ORIGIN OF SPECIES 27, 107 (Phillip Appleman ed., 1975) (capitalization in original).

104. *Id.* at 9, 33.

life, will have a better chance of surviving, and thus be *naturally selected*.”¹⁰⁵

As it is with pigeons, so might it be with politicians.¹⁰⁶ The available historical data suggests the size and reach of CCBMCs in California have grown substantially since *Bellotti* and *City of Berkeley*. I contend that changes in the political environment (including restrictions on candidate fundraising, skyrocketing campaign costs, and the strategic political advantages available from initiative involvement) led survival-minded candidates to see the ballot measure committee as a competitive advantage. In this way, BMCs (and CCBMCs specifically) “evolved” over a twenty-five year span in response to a changing political environment to become a new kind of organism unrecognized by the Court—the overlooked hermaphrodite—that challenges the core intellectual framework of *City of Berkeley*.

Three types of evidence underscore and explain this development. First, a careful analysis of the text of key Supreme Court cases suggests the Court did not adequately consider the impact of CCBMCs when deciding against contribution limits for ballot measure committees. Second, an evaluation of historical campaign finance data shows the prevalence of CCBMCs increased markedly in California since *Bellotti*. Third, the strategic advantages enjoyed by politicians who leverage their involvement in initiative campaigns demonstrate that candidates have a substantial political interest in the conduct and outcome of ballot measure campaigns.

A. Textual Analysis:

CCBMCs Are Conspicuously Absent From Key Court Decisions

The popular image of the initiative as the work of a “motley band of reformers and radicals” working to break through corrupt “party machine politics” seems to be duly recited whenever its origins are discussed.¹⁰⁷ This conception of the initiative as separate from the world of candidates is also discernable in caselaw. A close textual analysis of key Supreme Court decisions brings two points into stark relief. First, the Court generally describes candidates as having little political interest in initiative campaigns. Second, there is virtually no significant discussion of CCBMCs.

105. *Id.* at 27 (emphasis in original).

106. The application of a biological phenomenon to the political field is, of course, purely a metaphorical exercise. My aim is merely to suggest that the prevalence of an organizational form like the CCBMC and its utilization by political candidates may change depending on environmental factors and the needs of actors in the political arena.

107. See, e.g., ALLSWANG, *supra* note 22; PHILIP DUBOIS AND FLOYD FEENEY, LAWMAKING BY INITIATIVE 7-14 (1998); THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 38-59 (1989); Cody Hoesly, Note, *Reforming Direct Democracy: Lessons From Oregon*, 93 CALIF. L. REV. 1192 (2005).

Beginning with *Bellotti*, the Supreme Court accepts without question the assumption that politicians have a stake in their own election campaigns but in not impending initiatives: “[t]he risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue.”¹⁰⁸ As discussed in Part II *supra*, that assumption is taken directly from *Schwartz v. Romnes*.¹⁰⁹ In holding that political officials had no discernible interest in the outcome of an initiative that could be corrupted, the Second Circuit in *Schwartz* reasoned:

Corporate funds paid to a candidate or political party have the potential of creating debts that must be paid in the form of special interest legislation or administrative action. In contrast, *when the issue is one to be resolved by the public electorate monies paid by a corporation for public expression of its views create no debt or obligation on the part of the voters to favor the corporate contributor's special interest.* Although large private companies have undoubtedly been tempted to “buy” the election of political candidates in the expectation of receiving favors if their candidates should be elected, it is difficult to see how such motivation would play any substantial role in an attempt to influence votes for or against a referendum.¹¹⁰

A contribution to a candidate is described as having the capacity to create a political “debt” to the contributor, presumably because the candidate needs that money to fight for their election. Conversely, by this logic, a contribution to a ballot measure campaign does not lead to a political debt because the initiative derives from and is resolved by an electorate which cannot be collectively seduced by some sort of *quid pro quo* arrangement.

However, the distinction between initiative and candidate cannot rest solely on the fact that the voters determine the fate of the initiative, because voters ultimately exercise that same power over the fate of the candidate. Rather, the primary difference between initiative and candidate elections appears to be the involvement of a candidate who has a personal stake in the outcome, thus making her susceptible to a corrupt *quid pro quo* arrangement. The diffuse voting public lacks that strong personal interest and therefore faces no such danger.

It is here that the Court, perhaps unwittingly, embraces a vision of the initiative system as wholly separate from the interests of candidates. The Court admits that it cannot see how initiative contributions “would play any substantial role” in the creation of a political debt because it cannot identify from whom large donors would “buy” those favors.¹¹¹ As a

108. *Bellotti*, 435 U.S. at 790.

109. *Schwartz v. Romnes*, 495 F.2d 844 (2d Cir. 1974).

110. *Id.* at 851 (emphasis added).

111. *Id.*

consequence, the Court presumes candidates have no clear political interest in the outcome of an initiative battle that a campaign contribution could influence because their candidacy is not directly at issue.

City of Berkeley follows this same logic. There the Court describes initiatives as existing within a “tradition of volunteer committees for collective action,” where a group of “individuals can make their views known, when, individually, their voices would be faint or lost.”¹¹² The decision casts the initiative process as a policy-making exercise devoid of substantial influence from candidates.

Furthermore, *Buckley*, *City of Berkeley*, *Bellotti*, and *Schwartz* all make no discernable mention of CCBMCs. Notably, the *City of Berkeley* Court did not respond to two amicus briefs arguing that it is possible for ballot measure contributions to create undue influence with interested elected officials through CCBMCs.¹¹³ And despite some discussion among experts on the influence of CCBMCs as early as 1992,¹¹⁴ the Court has continued to uphold this questionable dichotomy.¹¹⁵ Even the 1995 *McIntyre* decision referred to ballot measures as different precisely because they are not candidate focused.¹¹⁶

Thus, the Court’s failure to specifically address CCBMCs permits the assumption that candidate cooptation of the initiative process was outside of the conceptual framework of the Court when it decided the landmark cases. The writings of the Court suggest a world where ballot measures are exclusive of candidates, and politicians may be rendered powerless by the populist might of the initiative, summoned forth as if by Roland’s Horn when representative government ceases to represent. However, as Professors Philip Dubois and Floyd Feeney point out, the “line between candidate elections and ballot measure elections is not as clear cut as the Court seems to suggest.”¹¹⁷ In actuality, the modern California experience directly contradicts the Court’s view.

112. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294 (1981).

113. *Hasen*, *supra* at note 21, at 895-96. The City and County of San Francisco noted the “danger that large contributions in ballot measure campaigns will be transformed into a political debt.” *Id.* at 895. The City of Santa Monica echoed that point, writing that while contributions to ballot measure committees are a far more indirect means to curry favor with a candidate, “the perceived potential for economic domination of political processes cannot be gainsaid.” *Id.* at 896 n. 65.

114. *See, e.g.*, CCCF, *supra* note 15.

115. *See Let’s Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980) (upholding a prohibition on contribution limits for ballot measure committees).

116. *See McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, at 347 (1995).

117. *DUBOIS & FEENEY*, *supra* note 107, at 198 (discussing *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995)).

*B. Historical Analysis:
CCBMCs Go From Zero to Hero in Thirty Years*

Treating initiative and candidate campaigns as mutually exclusive may have been reasonable in the 1970s and early 1980s when the federal courts handed down *Schwartz*, *Bellotti* and *City of Berkeley*, but today's reality belies that view. If initiatives were once a conversation between citizen proponents and the voters at large, the process is now significantly intermediated by political figures who actively use mass market advertising to influence the kind and quantity of those conversations. This Section's analysis adds to the historical record by showing that CCBMCs were almost nonexistent when the Court decided the *City of Berkeley* line of cases.

The two most obvious ways to measure growth of the CCBMC phenomenon over time are to count the number of committees operating and their total contributions received per year. This Section takes Professor Hasen's CCBMC data for the years 1990-2004 and bookends those figures with data from the 1975-76, 1981-82, and 2005 elections to make two points: First, CCBMCs did not exist in California in any substantial manner when cases such as *City of Berkeley* and *Bellotti* were decided. Second, CCBMCs are now well established in modern California politics and growing quickly.¹¹⁸

To determine whether CCBMCs were significant elements of the political system during the time of *Bellotti* and *City of Berkeley*, I attempted to identify CCBMCs from available campaign finance filings stored at the State Archives for two periods: 1975-76 and 1981-82.¹¹⁹ My

118. I examined the years 1975-76 and 1981-82 primarily for their proximity to three key Supreme Court decisions: *Buckley* (1976), *Bellotti* (1978) and *City of Berkeley* (1981). I also selected 1975-76 because it was the earliest year for which data was available. Few reliable records exist before 1975, when California's Political Reform Act (PRA) began to require more regular, detailed campaign finance filings. Moreover, even the data collected in the wake of the PRA is limited in its utility due to incompleteness. Recordkeeping practices changed around 1990 to mandate the filing of candidate-controlled committee statements along with the candidate's election filings, making post-1990 reform records far easier to analyze. Personal conversation, Reference Archivists, State Archives, April 4, 2006.

119. My methodology was as follows: After pulling all "Miscellaneous" campaign finance filings for the years noted, (twenty-two boxes for 1975-76 and thirty-seven boxes for 1981-82) I separated all likely BMCs (based on name of the committee) from political action committees and major donor filings. All likely BMC files were then examined for evidence of candidate control, usually the signature of the candidate controlling the committee. Because self-identified candidate filings may be fragmentary or incorrectly filled out, I also cross-referenced the names of the controlling officer with the names of all primary candidates for statewide office and the general election contestants for all state legislative races for that cycle's election, (1976 and 1982) as provided by the state ballot pamphlet for that election. This approach to verification is admittedly limited, as it excludes local races and half of the state Senate races, but it was the most practical method available. Data for 2005 was taken directly from Cal-Access.

The most common filing, the Form 420 "Recipient Committee Campaign Statement," requires that controlling candidates separately verify their campaign statements under penalty of perjury, as do the

presumption was if there were few or no CCBMCs operating prior to those key Supreme Court decisions (at least in California) then it would be more likely that the Court would overlook CCBMCs as a potential source of corruption.¹²⁰

An exhaustive search of the available records for 1975-76 yielded no verifiable sign of CCBMCs. I identified as many as 110 organizations that were likely ballot measure committees,¹²¹ not one of which was clearly identifiable as a CCBMC.¹²² The 1975-76 period was not a slow one for initiatives: the historical record shows thirty-four measures were titled and three qualified for the ballot during that time.¹²³ Ballot measure committees

Form 410 (Statement of Organization, Section 4 "Type of Committee") and the Form 460 (Recipient Committee Campaign Statement, Section 4 "Verification"). These documents also state whether the committee is general or primarily formed. For sample forms see http://www.ss.ca.gov/prd/campaign_info/forms_instructions/compend_camp_forms.htm.

120. Three strong words of caution: First, the available data was frequently incomplete, fragmentary, and/or incorrectly filed, particularly for the 1975-76 period. For example, some filers reported contributions for campaigns waged in 1974. Incomplete records also made it difficult to accurately separate political action committees from BMCs. As such, the number of BMCs is probably inflated. Second, I recognize the difficulty of extrapolating the Court's campaign finance paradigm based solely on California data, even given California's reputation as an initiative bellwether. Third, historical finance data have not been inflation adjusted, and are presented as given in the original source. Thus, these conclusions should be treated as tentative until more complete data for this and other states can be analyzed.

121. In assembling a list of BMCs for the years given, I generally excluded filings by initiative proponents unless they also reported receiving contributions, as well as any other committee lacking a clear controlling individual or a ballot measure proposed, supported, or opposed. I included referendum committees because they are functionally similar to, and hard to differentiate from, regular initiative committees. However, I excluded recall committees as well as any committee that made candidate contributions, which I categorized as political action committees.

122. Dempsey, "1975-76 BMCs" Spreadsheet (created April 4, 2006) (on file with author). There were two committees that initially appeared to be CCBMCs based on name matches. An individual named Lyle Cook formed a Property Taxation Initiative Constitutional Amendment Committee (\$950 in received contributions as of March 31, 1976), and a person of the same name was also a candidate for the 31st Assembly District. However, that committee's organizer marked the candidate verification "not applicable," suggesting that Mr. Cook may have been merely an initiative proponent and counted his own expenditures as contributions.

The second committee, Citizens United to End Tax Loopholes (\$19,767 in received contributions as of October 29, 1976) was controlled by volunteer treasurer Marilyn Y. Isenberg of Sacramento, the wife of the then-Mayor of Sacramento Phil Isenberg who himself had been the Chief of Staff to Assembly Speaker Willie Brown and later a distinguished State Assemblyman. (Committee statement on file with author). However, the candidate-control line of the available statement was not signed, in effect certifying that no candidate controlled or influenced the committee, a fact Mr. Isenberg confirmed to the author (Personal communication, Oct. 17, 2006). According to Mrs. Isenberg, the initiative itself (Proposition 5, to reduce the voter approval requirement for state bond issues) did stem from the legislative efforts of State Senator John Dunlap, who may have been involved with the committee. A second official, State Senator Joe Montoya, may also have been a co-chair. (Personal communication, Oct. 24, 2004). However, the limited documentary evidence available does not mention either Senator, and so the committee was not classified as a CCBMC for the purposes of this Comment.

123. "Proposition 15—Nuclear Power Plants" was on the June primary ballot, while two other measures "Proposition 13—Greyhound Dog Racing" and "Proposition 14—Agricultural Labor

spent nine million dollars to support and oppose those measures in the 1976 election.¹²⁴ Nonetheless, it appears that CCBMCs played no noticeable role in California initiative campaigns in the years immediately before *Bellotti* was decided.

A search of files for 1981-82 yielded largely similar results. One hundred and thirty-three organizations were identified as likely ballot measure committees but only one was clearly identifiable as candidate-controlled.¹²⁵ Marion Bergeson, a 70th Assembly district candidate, controlled an active committee named "Californians for Honesty in Taxation," which received at least \$8,011 in contributions.¹²⁶ The years 1981 and 1982 were busy ones for the initiative process. Forty-nine measures were titled, seven qualified for the ballot, and three were approved by voters during that period.¹²⁷ A total of \$25 million was spent to support and oppose ballot measures in 1982, meaning that clearly identifiable CCBMCs accounted for about .03% of initiative expenditures that year (assuming all contributions were spent).¹²⁸ CCBMCs' de minimis share of all BMC expenditures suggests they were not a salient feature in California's political landscape when the Supreme Court decided *City of Berkeley*.

The comparison of Hasen's CCBMC data for 1990-2004 against the data provided here for 1975-76, 1981-82, and 2005 shows little evidence of CCBMCs as a consistent campaign phenomenon, even during periods of normal initiative activity, until at least the mid-1980s.¹²⁹ However, the comparison does show CCBMCs were firmly established by 1990, with an increased number of active committees coinciding with an abnormally large amount of initiative activity during the 1988 and 1990 election cycles.¹³⁰ After that period, CCBMCs appeared in smaller numbers until a

Relations" were on the November ballot. See A HISTORY OF CALIFORNIA INITIATIVES, *supra* note 28, at 11-14.

124. CCCF, *supra* note 15, at 283 (Table 8.9).

125. Dempsey, "1981-82 BMCs" Spreadsheet (created April 4, 2006) (on file with author).

126. Form 420 "Californians for Honesty in Taxation" ID# 810099, filed Sept. 8, 1982 (on file with author). The filing covers the period spanning July 1981 through July 1982.

127. A HISTORY OF CALIFORNIA INITIATIVES, *supra* note 28, at 11-14. Expenditures were filed for nine initiatives. DUBOIS & FEENEY, *supra* note 107, at 243 Appendix A.

128. CCCF, *supra* note 15, at 283 (Table 8.9). This presumes the committee's filings represented the total contributions, and all contributions were spent.

129. To view Prof. Hasen's data for 1990-2004, see Richard L. Hasen, *Supplement to Rethinking of Unconstitutionality of Contribution and Expenditure Limits to Ballot Measure Campaigns*, available at <http://electionlawblog.org/archives/uscappendix>.

130. 1988 and 1990 show huge spikes in total initiative expenditures, going from about \$34 million in 1986 to \$127 million in 1988 and to \$110 million in 1990. CCCF, *supra* note 15, at 283 (Table 8.9). Daniel Smith places the beginning of California's initiative boom at 1982, when "issues committees spent more than \$36 million promoting and opposing propositions [and] ballot measure spending began to increase exponentially in California. Before that time, special interests were waging relatively inexpensive campaigns in California and other states" Daniel Smith, *Campaign*

spike of activity in 2000 and another in 2003 and thereafter. Contributions to CCBMCs also spiked in 1990, 1998, and 2003 (Figure 2).

Figure 1:
Number of Clearly Identifiable & Active California CCBMCs, per year.

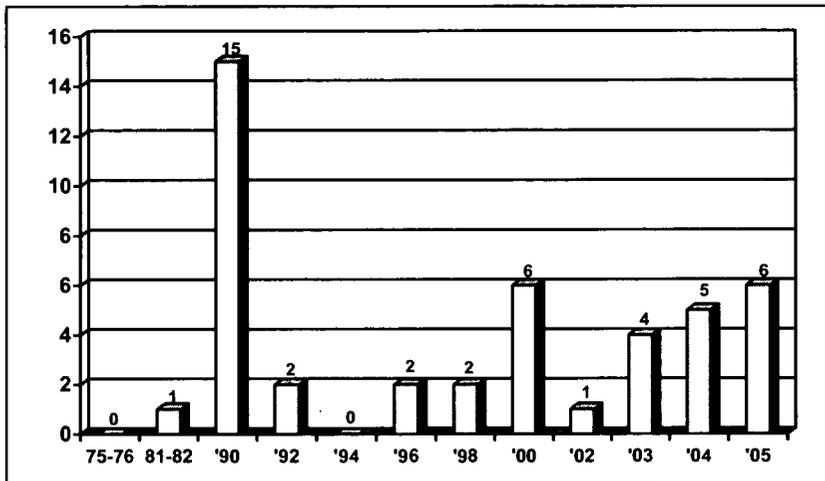
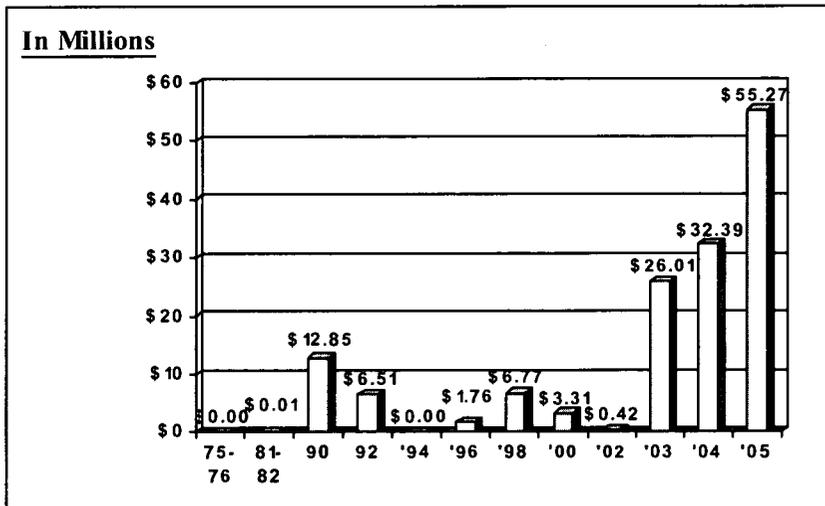


Figure 2:
Total Contributions Received by California CCBMCs, in Millions.



More recently, the November 2005 special election figures demonstrate an unprecedented level of CCBMC activity. Campaign finance data for 2005 from the California Secretary of State shows six operating CCBMCs out of a total thirty-five active BMCs working to support or oppose eight ballot measures.¹³¹ Together, the six CCBMCs received \$55.3 million out of \$390.6 million in total contributions to all BMCs in 2005.¹³²

As discussed in the Introduction, Governor Schwarzenegger's California Recovery Team accounted for the vast majority of CCBMC activity during the 2005 special election, collecting an estimated \$44 million, representing 80% of contributions to all CCBMCs.¹³³ Furthermore, CRT's total was largely the result of donations exceeding the Governor's regular candidate contribution limit. Three hundred fifty-six of nearly 8,000 donations to the committee were larger than \$22,300 and accounted for over \$33.8 million of the total amount raised.¹³⁴ Even after subtracting the \$7.75 million Schwarzenegger donated himself, contributions exceeding \$22,300 accounted for \$28 million dollars, roughly two-thirds of total contributions to the Governor's initiative committee. In contrast, for all of 2005 and through June of 2006, Schwarzenegger's reelection committee "Californians for Schwarzenegger—2006" received only \$21.1 million in contributions, although much more is sure to follow before the November general election.¹³⁵ These data demonstrate that the *City of Berkeley* decision effectively permitted a few hundred major corporate donors and wealthy individuals to give the Governor an extra \$26 million for his agenda that would have otherwise been barred if offered directly for his reelection.

If CCBMCs were largely unknown in the 1970s but booming by 2003, what explains their rapid rise? This question is complex, and a definitive answer is well beyond the scope of this Comment, but one

131. Those six CCBMCs (including candidates and aggregate special election 2005 contributions) were: "Schwarzenegger's California Recovery Team," Gov. Arnold Schwarzenegger (Id# 1261406) (\$44.1 million); "Redistrict California—Yes on 77," Insurance Commissioner candidate Steve Poizner (Id# 1279790) (\$8.5 million); "Committee to Protect California's Future—No on 77," Asm. Speaker Nunez (Id# 1277456) (\$2.5 million); "No on 74, 75," LA City Council President Alex Padilla, (Id#1281170) (\$76,100); "Steinberg's No on 75 Committee," State Senate candidate (and former Assemblyman) Darrell Steinberg, (Id#1280846) (\$27,304); "Mary Hayashi's No on 74, 75, 76 Committee," State Assembly Candidate Mary Hayashi, (Id#1280882) (\$13,500). There were an additional eight registered BMCs during the period, but they have no reported filings and were thus likely inactive. Cal-Access. 2005 Special Election Campaign Activity (last visited Apr. 4, 2006).

132. Dempsey, "CCBMCs 2000-05" spreadsheet, *supra* note 12.

133. Cal-Access, *supra* note 8. Professor Hasen provides an interesting and detailed analysis of Schwarzenegger's 2004 fundraising practices. See Hasen, *supra* at note 21, at 899-903.

134. Cal-Access, *supra* note 8. 356 of 7,952 individual donations.

135. Cal-Access, *supra* note 9. Smith observes that spending on *initiatives* has equaled or exceeded actual contributions to *candidates* in some races, particularly in 1998. Smith, *supra* note 130, at 77-78.

intriguing explanation has already been proposed by Elizabeth Garrett: candidates use CCBMCs to circumvent their own contribution limits.¹³⁶

California had two brief flirtations with candidate contribution limits before Proposition 34 in 2000 succeeded in setting such limits permanently. In 1988, Proposition 73 established candidate contribution limits, but during the period between its passage and its dismantling by the courts in 1990 confusion reigned among candidates, fund-raisers, and donors as to what level of contribution was legal.¹³⁷ The rise and fall of Proposition 208, which also limited contributions to candidates, occasioned the same kind of confusion between 1996 and 1998.¹³⁸ In 2000, contribution limits were finally implemented successfully with the passage of Proposition 34. That measure imposed per person contribution limits of \$3,000 for state legislative races, \$5,000-10,000 for statewide elective offices, and \$20,000 for gubernatorial races, all indexed to inflation.¹³⁹ These limits did not take effect until 2001 (2002 for statewide candidates).¹⁴⁰

Intriguingly, Figure 2 shows spikes in total contributions to CCBMCs that largely coincide with these same periods of regulation: 1988-1990, 1998, and 2003 and thereafter. The spikes suggest candidate contribution limits make the unlimited fundraising power of CCBMCs far more appealing to both politicians and the donors who hope to influence them. When new laws restrict (or appear to restrict) contributions to a candidate, large donors could simply redirect their money to the candidates' CCBMC instead.

The suspicion that special interest groups and candidates are using CCBMCs to circumvent candidate contribution limits is not new. The California Commission on Campaign Financing recognized this as a potential problem as far back as 1990.¹⁴¹ At the time, the campaign finance watchdog group Common Cause¹⁴² pointed out the threat unlimited initiative funding posed to state control over campaign finance. "Even though [CCBMCs] were controlled by legislators, they were not subject to the Prop. 73 contribution limits. As a result, PACs seeking to demonstrate their support of the [Democratic and Republican] leadership could give large sums of money to initiative committees [the leadership]

136. See Garrett, *supra* note 1, at 1105-10 (discussing candidate involvement in initiatives as driven partially by the benefits of unrestricted fundraising).

137. ALLSWANG, *supra* note 22, at 173-75, 175 n.75.

138. *Id.* at 225-26.

139. CAL. GOV'T. CODE §§ 85301-85303, 83124.

140. FAIR POLITICAL PRACTICES COMMISSION, 2006 ADDENDUM TO CAMPAIGN MANUALS 8 (2006), available at <http://www.fppc.ca.gov/manuals/2006Addendum.pdf> (last visited May 18, 2006).

141. CCCF, *supra* note 15, at 277.

142. Common Cause is "is a nonprofit, nonpartisan citizen's lobbying organization promoting open, honest and accountable government." See Common Cause.org, <http://www.commoncause.org>.

controlled.”¹⁴³ By restricting large candidate contributions, the Legislature may have inadvertently caused campaign contributions to flow like water to a less restrictive destination: the candidate-controlled ballot measure committee.¹⁴⁴

While it is beyond the scope of this Comment to prove this connection definitively,¹⁴⁵ the possibility of circumvention has two important implications (further discussed in Part IV *infra*): if candidate contribution limits do drive donations towards CCBMCs, then California should expect to see continued growth in the volume of CCBMC contributions. Moreover, other states with both the initiative power and candidate contribution limits should expect to see more CCBMC activity as well.¹⁴⁶ If future research can prove to the Court’s satisfaction that candidates are using CCBMCs to circumvent campaign contribution limits, then reform advocates will have a powerful argument for a compelling state interest in regulating CCBMC contributions.

C. Strategic Analysis:

CCBMCs Contribute to Candidates’ Political Survival

The potential benefits for candidates who involve themselves in the initiative wars are substantial. By proposing measures or campaigning for or against initiatives, candidates stand to gain by increasing their visibility, expanding their power, and restricting the power of their political opponents. Political realism suggests that candidates engaged in a struggle for political survival will use whatever legal means are available to succeed. If engaging in an initiative campaign allows a candidate to secure a comparative advantage and increase her own relative political power, then we should expect her to do so. Large contributions to CCBMCs may be valued by a candidate for the political advantages they provide, but the danger of a political “debt” will ineluctably follow closely behind.¹⁴⁷

The available literature identifies at least five different strategic advantages a candidate might gain from involvement in the initiative

143. *Id.* at 277 (quoting CALIFORNIA COMMON CAUSE, A FIST FULL OF DOLLARS: 1989-90 TOP TEN CONTRIBUTORS TO LEGISLATIVE CAMPAIGNS (July 1991)).

144. Of course, causality is easy to speculate about and terrifically hard to prove. Multiple other factors may also be at play, such as the increase in the salience and usefulness of initiatives after the revolution caused by Proposition 13 in 1978. On the fluidity of campaign contributions, see generally Samuel Issacharoff and Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705-38 (1999).

145. For a more detailed discussion of the circumvention problem, see Elizabeth Garrett, *Democracy in the Wake of the California Recall*, 153 U. PA. L. REV. 239, 250-53 (2004).

146. For further discussion of other states with these characteristics, see *infra*, Part IV.

147. Elizabeth Garrett examines such issues at length in her incisive piece on Schwarzenegger-era initiative finance, described *supra* at note 2. In it she declares that we have entered an era of “Hybrid Democracy” where initiatives and candidates have become inseparably intertwined. The article also extensively discusses strategic advantages for candidates who involve themselves in the initiative wars.

process. These advantages are: increasing candidate visibility and name identification, influencing policy agendas and decision making, shaping voter opinion and turnout, helping political allies and harming opponents, and accessing unlimited sources of funding to maximize these advantages.

1. *Increasing Candidate Visibility and Name Identification*

The most obvious advantage for a candidate in proposing, promoting or opposing an initiative is the increase in his or her public visibility. A “successfully passed initiative increases a politician’s visibility and thus their chances for higher office.”¹⁴⁸ There are a number of ways to tie one’s name to a ballot measure: a candidate can draft and propose the measure, support or oppose the measure on the ballot pamphlet, or even raise money to fund advertisements for or against a measure.

A candidate may wish to sponsor an initiative in hopes of winning public support by “affiliating themselves with a popular issue.”¹⁴⁹ This time-honored tradition goes back decades. In 1974, gubernatorial candidate Jerry Brown “[tied] himself tightly to the crusade against political corruption,” and co-sponsored the 1974 Political Reform Act as part of his strategy to gain the Democratic Party’s endorsement.¹⁵⁰ Indeed, as early as 1978, Professor Eugene Lee predicted the “initiative will be employed by candidates for public office as a part of their personal campaign strategy. In fact, this will be the prime motivation behind the drafting and sponsorship of some measures.”¹⁵¹

Professor Lee appears to have been spot-on in his prediction. Through the 1970s and 1980s, more than one-third of California ballot measures were initiated by candidates or office holders.¹⁵² Between 1988 and 1998, a total of twenty-one ballot measures were “sponsored or very closely affiliated with candidates for statewide office or other politicians, usually as an overt tool of their personal campaigns.”¹⁵³ In 1990, officeholders sponsored eleven of the eighteen measures on the California ballot.¹⁵⁴ Since the 1970s, the list of examples has grown so long it cannot be fully recounted here.¹⁵⁵ None other than Governor Schwarzenegger’s own

148. MATHEW MANWELLER, *THE PEOPLE VS. THE COURTS* 54 (2004).

149. CCCF, *supra* note 15, at 62.

150. JIM SHULTZ, *THE INITIATIVE COOKBOOK* 85 (1998). In fact, Gov. Hiram Johnson could be fairly considered the first California politician to do this by making direct democracy part of his gubernatorial platform.

151. DUBOIS AND FEENEY, *supra* note 108, at 24.

152. RICHARD J. ELLIS, *DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA* 80 (2002). Pages 80-86 provide an interesting survey of the phenomenon.

153. SHULTZ, *supra* note 150, at 85.

154. DUBOIS & FEENEY, *supra* note 107, at 198.

155. Some examples include: the death penalty measures in 1972 and 1978 that aided George Deukmejian in his 1978 run for Attorney General and 1982 campaign for Governor; the environmental warning measure Proposition 65 played a key part of the 1986 platforms for Assemblyman Tom

political mentor, Pete Wilson, used the initiative to great political effect in the 1990s by sponsoring measures such as the 1992 welfare-reform initiative (Proposition 165), and closely allying himself with the 1994 Three Strikes initiative (Proposition 184) and the 1994 initiative to revoke state services for undocumented immigrants (Proposition 187).¹⁵⁶

The initiative process affords candidates an opportunity to put their names and opinions before the voters in another important venue: voter guides published for each election by the Secretary of State. These guides provide arguments for and against every ballot measure. Hasen's examination of all 198 ballot measures for the years 1990-2004 found that 126 featured at least one argument for or against a measure signed by an elected legislative or statewide official.¹⁵⁷

Candidates also use BMC funds to run advertisements for or against a measure featuring the elected official. One concrete (but unlucky) example of the belief in this "visibility dividend" is former California Attorney General John Van de Kamp's effort in 1990 to build up public support for his gubernatorial candidacy by sponsoring three reform initiatives.¹⁵⁸ While the "strategy attracted widespread praise for bringing substance to the gubernatorial campaign," the cost of promoting his position on the measures caused Van de Kamp to expend his resources too early in the primary race and he subsequently lost the election.¹⁵⁹ In Van de Kamp's case, the candidate evidently viewed the visibility dividend as so important that he actually bankrupted his election campaign to pursue it.¹⁶⁰

Governor Schwarzenegger's 2004 campaign for Propositions 57 and 58 provides a second example of the visibility dividend's allure. These Propositions—a statewide budget bond and a balanced budget measure—were sponsored by the Governor and served as the centerpieces of the California Recovery Plan, a political strategy he promised to implement during his successful recall campaign.¹⁶¹ The radio and television ads for the measures featured Schwarzenegger himself reminding voters that the previous administration left the state with huge deficits and proclaiming he was "committed to putting our financial house in order, and I need your

Hayden, Mayoral candidate Tom Bradley, and Senate candidate Alan Cranston; and the "Big Green" environmental initiative in 1990, which was led in part by gubernatorial candidate John Van de Kamp. SHULTZ, *supra* note 150, at 86.

156. *Id.* at 87-88.

157. Hasen, *supra* note 21, at 898.

158. These initiatives were related to environmental protection, criminal justice, and campaign finance/term limits. CCCF, *supra* note 15, at 62. The measures were Propositions 128, 129, and 131.

159. *Id.*

160. What is interesting is that the candidate treated election and initiative money as fungible, but in the opposite direction (spending election-related funds on an initiative).

161. Press Release, Ads Supporting Props. 57, 58 Begin Airing, California Chamber of Commerce, available at <http://www.calchamber.com/CC/Headlines/Archive/PublicAffairsPolitics>.

help.”¹⁶² These commercials were paid for by the Schwarzenegger-controlled “Californians for a Balanced Budget” BMC which raised over \$8 million in the first half of 2004—at least \$7.6 million of which came in amounts larger than \$22,300.¹⁶³ Those large contributions permitted the Governor to engage in an advertising blitzkrieg that put his name, face, and message prominently before voters, leading one media watchdog organization to comment that the “Proposition 57 ads got more reps than Gov. Schwarzenegger’s abs” in the month before the election.¹⁶⁴

A third and more recent example shows how widespread the perception of the visibility dividend’s power has become. In May 2006, the Legislature came to a historic agreement with Governor Schwarzenegger to put a \$20 billion transportation bond before the voters in the November 2006 election. However, the bipartisan agreement was strained over the issue of whose face would appear in the television commercials. As one source reported to the *San Francisco Chronicle*, “[T]he governor wanted to star in the bipartisan bond commercials, which coincidentally would air right as he was running for reelection. Democrats, however, are saying, ‘No way.’”¹⁶⁵ One suggested compromise was to air separate advertisements featuring elected officials of different parties, all of which would run right before the election.¹⁶⁶

2. *Influencing Policy Agendas and Decision Making*

A second advantage of the initiative process is its ability to help politicians carry on the political struggles of their elected office by other means. An initiative gives an elected official the power to promote and enact favored policy proposals when such ideas cannot be secured through traditional channels. The initiative process provides political figures with their own kind of policy-making appeals process. This is no small advantage, as Mathew Manweller notes “the ability to set the agenda [by placing issues before the voters] strongly affects the ability to set policy.”¹⁶⁷

For example, a legislator could use the initiative process to circumvent the majority party or a powerful advocacy group. A legislator, even a highly successful one, does not always have the power to force a vote on an issue important to them or the populace. Manweller uses the

162. *Id.*

163. Cal-Access, Californians For A Balanced Budget—Yes on 57 & 58, (Id# 1261936) (Aug. 30, 2006). Note that Schwarzenegger’s California Recovery Team contributed more than \$5.3 million to that total.

164. John McManus, *Journalists must provide antidote to toxic campaign ads*, GRADETHENEWS.ORG, Mar. 17, 2004, <http://www.gradethenews.org/commentaries/campads.htm>.

165. Matier and Ross, *Samtrans A Shrinking Partner In Cash-Draining BART Peninsula Line*, S.F. CHRON., May 17, 2006, at B2.

166. *Id.*

167. MANWELLER, *supra* note 148, at 53.

example of an Oregon legislator who used the initiative process to place a victim's rights proposal before the voters, thereby outmaneuvering the opposition of a key special interest group blocking his proposal in the state Legislature. "[In] the context of the legislative process, [the legislator] did not have the ability to control the agenda. Lacking opportunity to get a vote on his legislation, the popular support for the bill became meaningless The initiative process guaranteed him a yes or no vote on his proposals."¹⁶⁸

Another example involves attempts by a legislature to avoid a gubernatorial veto, or in the alternative, a governor's desire for legislation that the legislature refuses to consider. In cases where different parties control the legislature and the governor's office, an initiative offers one party a means to end-run the other. Not surprisingly, one study found the number of legislative initiative referrals goes up when party control is split.¹⁶⁹ Joseph Zimmerman cites the example of Michigan Governor John Engler, who sponsored a property tax reduction initiative to circumvent a hostile legislature, and even "raised approximately \$1 million for an advertising campaign to convince voters to endorse the proposition."¹⁷⁰

Put a different way, initiatives give politicians who lose a policy debate a "second bite at the apple." Manweller gives the example of California Assemblywoman Doris Allen, who spent years attempting to pass a bill restricting the use of gill nets in fishing. Tired of losing the fight in her own house, she drafted an initiative, which subsequently failed. Undeterred, she sponsored the same proposal a second time, which then passed.¹⁷¹ Here, the initiative system functioned as a kind of inexhaustible appeals process. An official has as many "bites at the apple" as she or he can afford, with success presumably redounding to the benefit of the official at reelection time.

Similarly, Governor Schwarzenegger has used the initiative threat a number of times to counter opposition from California's Democrat-controlled legislature, with varying degrees of success.¹⁷² As a moderate Republican Governor, Schwarzenegger faced some formidable challenges upon entering office: a legislature controlled by the opposing party, minority Republicans who were more partisan on certain issues than he, a recent history of policy deadlock, and perennially bitter budget battles. When the Governor's calls for reapportionment fell on deaf ears in the Legislature, the initiative system permitted him to bypass the legislative branch entirely and place a reapportionment initiative on the 2005 ballot.¹⁷³

168. *Id.* at 54.

169. *See id.* at 53.

170. JOSEPH F. ZIMMERMAN, *THE INITIATIVE: CITIZEN LAW-MAKING* 92 (1999).

171. MANWELLER, *supra* note 148, at 53.

172. *See generally* Garrett, *supra* note 1.

173. *See id.* at 1121-30. The reapportionment initiative was Proposition 77, which ultimately failed passage.

Perhaps because of its ability to function as an appeals process for the losing side, Professor Elizabeth Garrett notes, “[Schwarzenegger’s] use of the initiative process should not have surprised anyone.”¹⁷⁴

3. *Shaping Voter Opinion and Turnout*

Politicians may choose to get involved in initiative campaigns because such campaigns have substantial power to influence voters in two key ways: whether a person will choose to vote, and if so, whom or what that person will vote for. The political science literature suggests that initiatives can have a demonstrable impact on election outcomes, particularly when spending is used to defeat an issue.

Initiatives have long been used to entice people to vote. One recent study found a ballot measure increases voter turnout by .5% in a Presidential election year, and by 1.2% in a mid-term election.¹⁷⁵ The effect is most pronounced in “less-competitive or lower-information” (read: less exciting) elections.¹⁷⁶ And because certain ballot measures may appeal to one demographic or group more than another, candidates can place particular issues on the ballot in order to “motivate people who are likely to support *them* to take the time to cast a ballot.”¹⁷⁷

One prime example is Governor Pete Wilson’s reelection bid against Treasurer Kathleen Brown in 1994. Wilson made Proposition 187, a measure denying benefits to undocumented immigrants, a major part of his campaign platform.¹⁷⁸ Presumably, the initiative was designed to address concerns among some conservative white voters regarding illegal immigration. By encouraging conservative white voters to go to the polls to support Proposition 187, the measure’s white Republican sponsor, Governor Wilson, anticipated claiming the bulk of their votes for his gubernatorial campaign as well.¹⁷⁹ The online news publication *Salon* opined that the immigrant “bashing” tactic worked—the measure passed by nearly 60% in 1994. Proposition 187 was the “ticket to [Wilson’s] political

174. *Id.* at 1121.

175. *Id.* at 1099 (citing DANIEL SMITH & CAROLINE TOLBERT, EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES 39-42 (2004)). The study also indicated that the effects are cumulative only to a limited extent. While the use of ballot initiatives encourages voter turnout, there is no finding that voter turnout increases in correlation to the actual number of measures on the ballot. *Id.* at 1099 n. 12.

176. *Id.* at 1099.

177. *Id.* (emphasis in original).

178. SHULTZ, *supra* note 150, at 88.

179. Stanley Mailman, *California’s Proposition 187 and Its Lessons*, 1 N.Y. L.J. 3 (1995), available at <http://www.ssbb.com/article1.html>. As Mailman notes, the official ballot measure argument described the measure as “the first giant stride in ultimately ending the ILLEGAL ALIEN invasion.” *Id.* at 3 (emphasis in original).

success” after making the illegal immigration issue the “cornerstone” of his “lagging reelection campaign.”¹⁸⁰

Governor Schwarzenegger was accused of doing much the same thing in the months before the November 2005 special election, when his stump speeches “suddenly became all about the landmark Proposition 13 property tax measure.”¹⁸¹ Schwarzenegger warned “elderly homeowners [that] they could lose their houses to taxes if Democrats and union leaders get their way in the fall.”¹⁸² The Governor himself said, “[d]on’t you dare touch Proposition 13, because the people of California voted to protect their homes.”¹⁸³ What was strange about the Governor’s statement is there were no property tax measures on the ballot, and none were widely expected. As one Democratic spokesman commented, such a proposal was not “even on anyone’s radar screen” and “[t]he governor is trying to scare people to the polls, and that’s shameful.”¹⁸⁴

The political science literature calls these strategic measures “wedge” and “jack” issues.¹⁸⁵ Wedge issues divide a particular party and can drive away certain voters.¹⁸⁶ Conversely, jack issues increase turnout among certain voters.¹⁸⁷ There is no shortage of recent examples, and the uproar over same-sex marriage is a prime instance of the jack issue in action. In fact, ballot measures banning same-sex marriage in several states are partially credited for driving up turnout for George W. Bush in the 2004 general election.¹⁸⁸

Candidates may align themselves closely with particular initiatives in order to relay information about their positions and build favorable impressions of their candidacy with the public. A 1998 study by Anthony Salvanto examined the use of initiatives as “running mates,” and found strong linkages between voters’ choice of initiative and choice of candidate, in part because candidates matched their campaign themes to proposed initiatives.¹⁸⁹ Indeed, even the Governor’s own people conflate his performance as the state’s chief executive with the performance of his initiatives. When a reporter asked Marty Wilson, the Governor’s chief fundraiser, about the ramifications of Schwarzenegger’s 2005 special

180. See Anthony York, *R.I.P. Prop 187*, SALON.COM, July 7, 1999, <http://www.salon.com/news/feature/1999/07/30/immigration>.

181. John Wildermuth & Carla Marinucci, *Governor Says Proposition 13 is at Risk if His Ballot Measures Are Defeated*, S.F. CHRON., June 15, 2005, at A1.

182. *Id.*

183. *Id.*

184. *Id.*

185. See Garrett, *supra* note 1, at 1101-02.

186. *Id.*

187. *Id.*

188. *Id.*

189. Anthony Salvanto, *Initiatives as Running Mates: The Impact of a Candidate-Centered Initiative Campaign* (research paper, Center for the Study of Democracy, UC Irvine (1998)).

election, he noted a special election “is, to a degree, a referendum on the governor who brings it”¹⁹⁰

Candidates also have the added advantage of the “bully pulpit,” and can use their positions as “elites” to influence public opinion. In the 1991 initiative battle over term limits in Washington state, a ballot measure victory would have quickly put the state’s entire Congressional delegation out to pasture within two years, including then-U.S. House Speaker Tom Foley.¹⁹¹ Speaker Foley became “a central figure in the campaign” to defeat term limits through television and radio ads and newspaper editorials. By the end of the campaign, 64% of voters were aware of Foley’s opposition, compared to 30% who knew the position of their own Congressman. The author of the study concluded Foley’s influence may well have been the deciding factor, based on the fact that “citizens who are well-informed react to political ideas on the basis of cues provided by elites.”¹⁹² It is hard to believe that elites would not value the contributions that make communication of their views to the masses possible.

4. *Helping Political Allies and Harming Opponents*

Initiatives provide elected officials with an ideal means to aid their political allies and punish or restrict the influence of their enemies. Helpful influence can take the form of an initiative campaign which drives up voter turnout to aid allies. An example of such a campaign is Pete Wilson’s promotion of the anti-affirmative action initiative Proposition 209 in 1996 to influence the presidential race. According to Jim Shultz, Governor Wilson’s fundraising pitch for Proposition 209 included telling California business leaders that ballot measure donations to support the Proposition 209 campaign were “a way of boosting GOP Candidate Bob Dole’s California Presidential campaign.”¹⁹³

Initiatives also help friendly groups increase their membership and fundraising. Professor Garrett offers the example of an anti-tax group associated with Representative Dick Arney (R-TX) that “used a series of initiatives limiting taxes and spending to build its membership base and raise money.”¹⁹⁴ In another example, the liberal advocacy group Association of Community Organizations for Reform Now (ACORN) sought to benefit itself and liberal allies from a drive to enact a minimum wage initiative in Florida in 2004. That measure allegedly had the twin

190. Joan M. Hubbell & Mark Martin, *Battle for Capitol—Governor’s Big Test*, S.F. CHRON., June 14, 2005, at A1.

191. Jeffrey Karp, *The Influence of Elite Endorsements in Initiative Campaigns*, in CITIZENS AS LEGISLATORS 149-165 (Shaun Bowler et al. eds., 1998).

192. *Id.* at 163.

193. SHULTZ, *supra* note 150, at 88.

194. Garrett, *supra* note 1, at 1103-04.

goals of increasing Democratic turnout in a presidential battleground state while building within the organization a “permanent political capacity for future gains.”¹⁹⁵

Conversely, candidates use initiatives to restrict the power of political opponents. One classic illustration is political redistricting. According to John Allswang, 1982 saw three separate Republican-led referenda challenging California’s 1981 reapportionment plan engineered by a Democratic legislature.¹⁹⁶ In 1984, Republican Governor George Deukmejian supported Proposition 39, which would have taken control of redistricting from his political opponents, thereby helping to increase, or at least protect, Republican representation in the legislature.¹⁹⁷ Redistricting initiatives have been a staple of Sacramento politics ever since, and the 2005 special election was no exception. Governor Schwarzenegger’s California Recovery Team spent heavily on behalf of Proposition 77, which would have taken redistricting authority away from the majority party and given it to a non-partisan panel of judges.¹⁹⁸

Initiatives are also useful for putting one’s opponents on the defensive and draining their resources. A proposed measure can directly curtail an opponent’s influence if passed, or at least force that opponent to expend campaign funds to defeat it. Such measures have been termed “crypto-initiatives” because, as Garrett notes, “they are designed to serve political objectives instead of primarily intended to enact policy change.”¹⁹⁹

One great example of this approach was Proposition 226, the 1998 “paycheck protection” measure that was “part of a national effort by conservatives to deal a critical blow to the political power of organized labor” during a gubernatorial election year.²⁰⁰ The initiative, if passed, would have required unions to secure the written permission of members before withholding wages or using union dues for political purposes—a requirement that would have made union fundraising and campaigning for political causes far more difficult. Of course, because unions are strong supporters of the Democrats, its passage would have had “a cataclysmic effect” on the Democratic Party.²⁰¹ Predictably, Republican Governor Pete Wilson publicly campaigned for the measure, raised money for it, threatened legal action to get anti-Proposition 226 ads taken off the air, and

195. *Id.* at 1104 (quoting Jerry Seper, *Liberals Target Bush with Florida Wage Initiative*, WASH. TIMES, Oct. 25, 2004, at A3).

196. ALLSWANG, *supra* note 22, at 167.

197. *Id.*

198. See Proposition 77, Title and Summary, available at http://www.ss.ca.gov/elections/bp_nov05/voter_info_pdf/entire77.pdf.

199. Garrett, *supra* note 1, at 1098 (citing Thad Kousser & Mathew McCubbins, *Social Choice, Crypto-Initiatives and Policy Making by Direct Democracy*, 78 S. CAL. L. REV. 949, 969-70, 974 (2005)).

200. ALLSWANG, *supra* note 22, at 232.

201. *Id.*

even went so far as to spend \$1.2 million of his own money to support the measure.²⁰² And while the initiative itself may have failed, the mere threat of it almost certainly succeeded in drawing away Democratic Party resources, thereby demonstrating how ballot measures can be used strategically to undercut one's opponents.

5. *Circumventing Contribution Limits and Creating Fungible Campaign Funding*

Finally, the initiative process is attractive to political candidates because it gives them access to an unlimited source of contributions. The unrestricted money can in turn be used to pursue the other benefits of initiative involvement described *supra*. To the degree initiatives allow candidates to "tap additional sources of money" for uses supporting their own electoral goals, it is fair to say that BMC contributions are, for all practical purposes, somewhat fungible with election contributions.²⁰³ As mentioned above, politicians can use initiative funds to run television ads featuring themselves, thereby increasing name identification and creating positive associations with certain issues. Recall that Governor Schwarzenegger's preelection TV blitz on behalf of Propositions 57 and 58 was done to fulfill an *election* campaign promise. Unlimited contributions to the Governor's initiative committees made such a media blitz possible.

The incentives created by the partial fungibility of initiative contributions may cause shifts in contribution patterns that approximate circumvention. Commentators have observed that:

[s]ponsoring or becoming associated with an initiative campaign may enable candidates or contributors to escape some of the rigors of normal campaign finance rule . . . find[ing] it easier or more effective to invest their resources in initiative campaigns because of restrictions on the amount that can be contributed²⁰⁴

The evidence from the 2005 special election coincides with that view.

Garrett argues forcefully that CCBMCs have become a tool for circumvention. "[C]andidates use issue committees to raise unlimited amounts of money from supporters and spend that money in ways that benefit them, circumventing campaign finance regulations that apply in candidate elections."²⁰⁵ In surveying Governor Schwarzenegger's prodigious initiative fundraising from corporations with interests before his administration, Garrett found that "[n]o one has more aggressively used the ability to raise unlimited funds for issue committees to further his political

202. *Id.* at 233.

203. CCCF, *supra* note 15, at 62.

204. DUBOIS & FEENEY, *supra* note 107, at 192.

205. Garrett, *supra* note 1, at 1105.

agenda and electoral future than Arnold Schwarzenegger.”²⁰⁶ She concluded that “[o]nly an extraordinarily naive person would believe that Schwarzenegger is less grateful to interests funding ballot question campaigns vital to his agenda than to those contributing directly to his campaign committee.”²⁰⁷

Garrett also rightly notes both Republicans and Democrats engage in the practice. By her account, Lieutenant Governor Cruz Bustamante tried to benefit from the partial fungibility of ballot measure contributions during the 2003 recall. Rather than return certain large (and potentially illegal) election contributions he had previously received, Bustamante transferred the money over to a committee created to fight the “Racial Privacy Initiative” (Proposition 54), which would have banned state agencies from collecting racial data in all but a few cases.²⁰⁸ Those transferred funds ultimately

played a large role in defeating the initiative, a matter important both to Bustamante and his constituents, and it allowed the Lieutenant Governor to spend the money in a way designed to help his campaign. He appeared in many of the ads, and the people who were likely to turn out to vote against Proposition 54 were also likely to vote for him.²⁰⁹

Together, these five strategic advantages demonstrate the substantial incentives for candidates to associate themselves with initiative campaigns. To the extent a candidate becomes involved in an initiative campaign, it is reasonable to presume the candidate has a substantial political interest in the initiative. Since actual campaign expenditures can influence the course of ballot measure campaigns and the results they produce, fundraising becomes critical.²¹⁰ Unfortunately, as CCBMC contributions become important elements of a candidate’s larger political strategy, those contributions create an equal risk of corruption or the appearance thereof.

206. *Id.*

207. *Id.* at 1106.

208. Elizabeth Garrett, *Symposium: The Law of Democracy: New Issues in the Law of Democracy: Democracy in the Wake of the California Recall*, 153 U. PA. L. REV. 239, 250 (2004-2005).

209. *Id.*

210. While there is substantial evidence that campaign expenditures do indeed influence ballot measure campaign outcomes, the extent of that influence is still under debate. One frequently-made argument is worth raising here: high levels of spending are generally better at killing initiatives than in helping to pass them. For further discussion on the connection between campaign expenditures and outcomes, see ELISABETH R. GERBER, *INTEREST GROUP INFLUENCE IN THE CALIFORNIA INITIATIVE PROCESS* 17-20 (Public Policy Institute of California 1998); BETTY H. ZISK, *MONEY, MEDIA, AND THE GRASS ROOTS: STATE BALLOT ISSUES AND THE ELECTORAL PROCESS* 90 (Sage Publications 1987); Daniel Lowenstein, *Campaign Spending and Ballot Initiatives: Recent Experience, Public Choice Theory and the First Amendment*, UCLA L. REV. 29 (1982); and Smith, *supra* note 130.

D. Summary of Analyses

These three forms of evidence—textual clues, historical campaign finance data, and structural advantages—suggest that CCBMCs have become the “overlooked hermaphrodite” of campaign finance in California. The Supreme Court in *Bellotti* and *City of Berkeley* never seriously considered the possibility that candidates would co-opt BMCs to serve their own political ends. Over time, candidate and initiative campaigns have developed in ways that the Court previously believed were mutually exclusive, leading to the rise of CCBMCs as alternative vehicles for candidates’ political agendas.

In a larger sense, when the personal interests of individuals, such as election candidates, are at stake, it is predictable that those individuals will use whatever means available to emerge victorious, even if it means expanding the struggle for survival beyond the traditional practices of candidates. Adaptation in the service of survival is as much a mandate for political candidates today as it was for Darwin’s pigeons one hundred and fifty years ago. At the same time, however, our democracy requires an electoral system that operates with integrity and transparency. In that spirit, the doctrine governing campaign finance of ballot measures needs to evolve as well.

IV

IMPLICATIONS: FUTURE PROBLEMS AND POTENTIAL SOLUTIONS

This Comment has endeavored to examine the arguments in favor of the Supreme Court revising its *City of Berkeley* decision to permit states to regulate contributions to CCBMCs. This inquiry is important for at least two reasons. First, the CCBMC phenomenon is likely not unique to California. At least seventeen other states have the two conditions making them most likely to harbor CCBMCs: the power of direct democracy and some form of limit on contributions to candidates. This means that CCBMC activity and the threat of circumvention may be more of a national problem than the California example by itself suggests. Second, an examination of the weaknesses of the *City of Berkeley* precedent is important for what it tells us about crafting a viable solution. As such, closely tailored restrictions on contributions to CCBMCs alone may be the best hope for winning the approval of the Roberts Court if and when the issue comes before it.

As noted earlier, California’s Third Circuit upheld an injunction on the FPPC’s CCBMC regulations, and there is little reason to expect a different outcome if there are further appeals. As such, any change to the law—at least in California—will need to begin with the Legislature or perhaps, in the ultimate irony, yet another initiative campaign. Regardless of the vehicle, the expanding scale of the CCBMC phenomenon and the

failure of regulations to restrict them suggest that the rise of a viable constitutional challenge may only be a matter of time.

*A. CCBMCs Unchecked:
Is California on the Cutting Edge of a National Problem?*

It has been said that California's experience with initiatives often presages similar changes in other states. As Allswang writes, "what has happened in California has been reflected, although generally to a lesser extent, in other places."²¹¹ While this Comment focuses on the California experience, there is no reason to think the CCBMC phenomenon cannot occur in other states. Perhaps it already has. If we accept the supposition that CCBMC contributions are driven, at least in part, by the imposition of candidate contribution limits, then any state with both the initiative power and candidate contribution limits is fertile ground for the kind of circumvention problem that California is arguably already experiencing.

Twenty-four states currently have initiative and referendum powers comparable to California's.²¹² Of those twenty-four, seventeen also have some form of individual candidate contribution limit: Alaska, Arizona, Arkansas, Colorado, Florida, Idaho, Maine, Massachusetts, Michigan, Missouri, Montana, Nevada, Ohio, Oklahoma, South Dakota, Washington, and Wyoming.²¹³ These seventeen states are therefore the most at-risk for a CCBMC circumvention problem because of the inevitable temptation for home-state politicians to seize upon CCBMCs as a source of strategic advantage and political funding unencumbered by individual contribution limits. In fact, the states with the lowest candidate contribution limits are also likely to be the states where CCBMCs offer candidates the greatest comparative advantage, and those states are therefore most likely to see CCBMC development and experience circumvention problems. Future researchers may wish to focus on these states first when looking for evidence of CCBMC activity and any concomitant circumvention. Furthermore, other states may be better situated than California to challenge the *City of Berkeley* doctrine because California's Political Reform Act requires a 2/3 vote in the Legislature to amend its provisions, thereby preventing it from easily enacting a statute restricting CCBMCs.²¹⁴ Other states without similar laws should be able to enact CCBMC

211. ALLSWANG, *supra* note 22, at 4.

212. Initiative and Referendum Institute, Which States Have the Initiative and Referendum Process? I & R Factsheet Number 3, *supra* note 28. Illinois also has the initiative, but it is advisory only. *Id.*

213. NATIONAL CONFERENCE OF STATE LEGISLATURES, LIMITS ON INDIVIDUAL CONTRIBUTIONS TO CANDIDATES (Updated Aug. 2, 2005), available at <http://www.ncsl.org/programs/legman/about/IndCand.htm>.

214. Cal. Gov't Code § 81012 (Deering 2006).

restrictions with a simple majority vote, which would likely lead to a legal challenge and a hearing on the merits.

B. CCBMCs Reined In: Potential Forms of Regulation

Potential legislation could take a number of shapes, and Professor Hasen has preemptively reviewed the constitutional strength of three possible approaches for reining in ballot measure contributions: contribution restrictions on CCBMCs only, contribution restrictions for all BMCs, and expenditure restrictions on corporate entities such as businesses and unions. Based on the evidence examined by this Comment, I would argue in favor of CCBMC-specific restrictions as being the most defensible, albeit incomplete, option for vindicating the state's interests in preventing corruption and promoting political competition.

At the outset, a limit on contributions to CCBMCs alone is justified by the demonstrable danger of the appearance of candidate corruption. As this Comment has argued, it is folly to continue to believe that candidates do not have a potentially corruptible political interest in the conduct and outcome of initiatives. For the same reason, advocates of reform could credibly argue for such restrictions on anti-circumvention grounds, a point Professor Hasen himself has made.²¹⁵ Restrictions on CCBMCs alone also have the benefit of being closely tailored to the problem discussed here: candidates have co-opted ballot measure committees in order to further their own political careers. While restrictions on BMCs as a whole may be defensible on other grounds, such a proposal remains open to charges of overbreadth by restricting BMCs not affiliated with candidates. CCBMC-focused contribution limits, perhaps set according to the size of the limits on the candidate's own election committee donations, would permit state regulation under the most closely tailored framework possible.

Of course, this narrow approach has its drawbacks. First Amendment rights of association could still be impacted, as candidates would be dissuaded from associating themselves with ballot measure committees for fear of imposing their own contribution limits on the committee.²¹⁶ This approach might be somewhat unfair to certain politicians, as candidates for different offices have different contribution limits, which would place a committee controlled by a state Assemblywoman at a great disadvantage (currently with a \$3,300 contribution limit) to one controlled by the Governor (\$22,300).²¹⁷ Of course, some would take a principled position and say that there should be no contribution restrictions on BMCs at all.²¹⁸

215. Hasen, *supra* at note 21, at 903-04.

216. *Id.* at 905.

217. *Id.* at 906.

218. For the classic defense of the *City of Berkeley* decision, see John Mueller and James Parrinello, *The Constitutionality of Limits on Ballot Measure Contributions*, 57 N.D. L. REV. 391 (1981).

In the alternative, a single contribution limit could be placed on all CCBMCs, regardless of the candidate in control.²¹⁹ However, a candidate could conceivably evade restrictions by creating multiple committees, each eligible to receive donations up to the contribution limit. In fact, after the FPPC promulgated its CCBMC regulation in 2004, the Schwarzenegger administration began forming committees to do just that.²²⁰ Furthermore, restrictions on CCBMCs might simply cause elected officials to distance themselves from allied committees without ending the connection. In this scenario, a candidate might still solicit (and indirectly reword) contributions for a favored committee, thereby making it harder for the public to follow the money passing between donors and the candidate.

All of these concerns may be valid, but any such unfairness would be minimized by the narrow tailoring of the rule and outweighed by the salutary anti-corruption benefits the state's political system would enjoy. While it is true that CCBCM-specific restrictions would probably only attenuate the connection between candidates and BMC contributions rather than break it, this approach still remains the most promising means to prevent large contributions from making their way into the hands of candidates. By barring direct coordination between a candidate and unrestricted BMCs, the candidate could no longer legally direct or influence the expenditure of the money, which renders the money less useful and therefore less valuable. Supplemental regulations or statutes might help further restrict candidate involvement perhaps by imposing one contribution limit for all of a candidate's committees for a specific measure, restricting direct fundraising solicitations by candidates on behalf of unaffiliated BMCs or barring candidates from appearing as 'spokespersons' in advertisements paid for by third parties unless some portion of the media costs are counted as a contribution to the candidate. Admittedly, in the hydraulic world of campaign finance, regulating CCBMCs may only shift the influence of major campaign donors to another mode of giving rather than stop it. Nevertheless, this approach would help weaken the candidate-contribution link, and has the added value of being closely tailored to the declared problem. It is also worth noting that Professor Hasen has previously argued that such a narrow proposal stands "a very good chance of passing constitutional muster."²²¹

Of course, one could take a broader approach and restrict contributions to all BMCs regardless of candidate involvement. This would obviate the possibility that candidates might solicit and reward unlimited

219. This was the legislative approach taken by California's AB 709 (Wolk) in 2005, described *supra* note 101.

220. Mark Martin, *Schwarzenegger Ready to Top Last Year's Fundraising Record*, S.F. CHRON., Feb. 1, 2005, at B2.

221. Hasen, *supra* note 21, at 907.

contributions to BMCs allied with, but not directly controlled by, the candidate while still reaping political benefits. But by going beyond CCBMCs to restrict all BMCs, the proposal becomes much more difficult to justify, primarily because it may no longer be closely tailored to the identified problem. But again, other justifications beyond those discussed here may make such an approach defensible. Absent that, putting restrictions on BMCs totally unrelated to a candidate would invite the skeptical scrutiny of the Roberts Court. Shultz has suggested that a high contribution limit (\$100,000)—which the California Commission on Campaign Financing suggested in 1992—may be sufficient to avoid an overbreadth challenge, but then the limit's value would be greatly diminished because major donors would still be able to make contributions four times the size of current gubernatorial gift limits.²²²

Hasen has recommended framing BMC contribution limits as a means of “promoting voter confidence in the electoral process,” and suggests relying heavily on social science data to make the case.²²³ This approach would reduce the ability of wealthy special interest groups to overwhelm the initiative process, and might even help block qualification of initiatives supported by individual interests (single corporations, unions, groups, or persons). However, wealthy groups could simply forgo the creation of a BMC and pay for advertisements directly with independent expenditures, which are protected as integral to First Amendment speech.²²⁴ Finally, expenditure limits on corporations and unions theoretically remain an option, but *Randall v. Sorrell* suggests that the Court would not be favorably disposed towards the idea, such that the game may ultimately not be worth the candle.

In short, contribution restrictions on CCBMCs are an imperfect solution, but certainly a step in the right direction. Such restrictions would constitute a closely tailored response to an increasingly well-documented problem and are more likely to pass constitutional muster with a Court that seems to be increasingly skeptical of significant new restrictions on campaign financing. Admittedly, much of the money prevented from reaching CCBMCs would likely find its way back into the consciousness of a candidate, either through contributions to an uncontrolled but friendly BMC or through independent expenditures. But CCBMC restrictions, if upheld, would still take massive contributions out of the direct control of candidates. Attenuation of the candidate-contribution nexus remains a worthwhile goal because it helps advance the ultimate purpose of

222. SHULTZ, *supra* note 150, at 90; CCCF, *supra* note 15, at 296. As mentioned above, the current individual contribution limit for donations to gubernatorial candidates is \$22,300.

223. Hasen, *supra* note 21, at 909-11.

224. CCCF, *supra* note 15, at 296-97.

preventing corruption, the appearance of corruption, and the circumvention of existing law.

CONCLUSION

California's recent experience with the initiative system demonstrates that effective campaign finance controls are breaking down. Candidates controlling ballot measure committees are taking large contributions from special interests in order to promote their own electoral futures, protected all the while by the fiction that they have no real stake in the process. The Supreme Court's outdated *City of Berkeley* decision continues to bar California and other states from putting a stop to this. If nothing is done, we are likely to see a continued blurring of the line between initiative and candidate races. California will continue its seemingly inexorable march towards the "neverendum," where fundraising, ballot measures, and candidate campaigns have become inseparable and unending. Governor Schwarzenegger's use of the initiative to continue his power struggle with the California Legislature has only quickened the transformation. There is no reason to think this financial arms race will recede of its own accord; nor is it likely that this phenomenon will be the province of only one political party, or even one state.

One final anecdote may best demonstrate where the state could be headed. In a special report on the connections between Schwarzenegger's prodigious fundraising and the 2005 special election, the *L.A. Times* noted that many of the Governor's ballot measure donations were from large donors giving \$25,000 or more, several of which had issues pending before him.²²⁵ One "veteran lobbyist" speaking about the fundraising atmosphere surrounding the Governor's initiatives said "[t]here was nothing unlawful," but there was the message: "You want to do OK next year? Play ball."²²⁶ When asked to comment on the current state of ballot measure committee fundraising in Sacramento, one political science professor told the *L.A. Times* bluntly: the "lack of contribution limits on initiative contests 'opens the floodgates for special interests to give to candidates indirectly, to the candidate's pet causes and to the candidates' governing agenda . . . And it opens the question of corruption or the appearance of corruption.'"²²⁷

Now that candidate-controlled ballot measure committees are a substantial force in the California initiative system, the United States Supreme Court should face this reality head-on. State legislators could, if they wished, pass laws to bar unlimited fundraising by CCBMCs, giving the Court the chance to finally determine the legality of the practice. In the

225. Dan Morain, *Initiative Fundraising in High Gear*, L.A. TIMES, Oct. 27, 2005, at B1.

226. *Id.* at B8. Note that this quote was made in reference to fundraising by state legislators who opposed the Governor's initiatives.

227. *Id.*

intervening time, state legislatures may also wish to collect further data on home-state CCBMCs, if they do not do so already. Here in California, the Secretary of State could make CCBMC activity more transparent by tabulating contribution receipts and expenditures for CCBMCs as a separate category on Cal-Access. Such transparency would allow future academics, journalists, and policy-makers to more easily identify and measure the money flowing into these accounts.

Unless campaign finance law is permitted to evolve with changes in the political environment, California voters' faith in representative government may dissipate even further, just as the *Buckley* Court feared it might.²²⁸ The initiative fundraising loophole demonstrated by the CCBMC phenomenon must be addressed if we are to reassure the 78% of California voters who in 2005 believed their state government was "run by a few big interests."²²⁹ As Justice Souter noted in *Nixon*, "[d]emocracy works 'only if the people have faith in those who govern.'"²³⁰ If we "[l]eave the perception of impropriety unanswered . . . 'that faith is bound to be shattered.'"²³¹

228. *Buckley v. Valeo*, 424 U.S. 1, 27-28 (1976) (per curiam).

229. Press Release, Public Policy Institute of California, Special Post-Election Voter Survey: Bah Humbug! (Dec. 5, 2005), <http://www.ppic.org/main/pressrelease.asp?p=596>.

230. 528 U.S. at 390.

231. *Id.* (quoting *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961)).

